IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

NO. 79-616

MOHASCO CORPORATION,

Petitioner,

vs.

RALPH H. SILVER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner Mohasco Corporation (hereinafter "Mohasco") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on July 18, 1979.

OPINIONS BELOW.

The Opinion of the District Court for the Northern District of New York of October 17, 1978, granting Mohasco's Motion for Summary Judgment, is reported unofficially at 19 FEP Cases 677 and is reproduced in Appendix A herein (App. A1 - A22). The Opinion of the Court of Appeals of July 18, 1979, reversing the trial court, is unofficially reported at 20 FEP Cases 464 and 20 CCH EPD ¶30, 137, and is reproduced in Appendix A herein (App. A23 - A44).

JURISDICTION.

The opinion by a divided panel of the Court of Appeals was entered on July 18, 1979 (App. A23 - A44). Jurisdiction is conferred on this Court by 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED.

(1) (a) Whether the Court of Appeals for the Second Circuit erred in holding that in enacting Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e, *et seq.* (hereinafter referred to as "Title VII"), Congress intended the word "filed" to mean different things in Title VII §§ 706(c) and (e), 42 U.S.C. §§ 2000e-5(c) and (e) (hereinafter referred to as "§ 706(c)" and "§ 706(e)" respectively), so that a charge is "filed" on receipt by the Equal Employment Opportunity Commission (hereinafter referred to as "EEOC") for purposes of calculating the § 706(e) limitations period, but "filed" only after the expiration of the period of deferral to the State agency for § 706(c) purposes;
or
(b) If the Second Circuit did not err in so holding, whether it erred in further holding that the charging party may take advantage of the extended 300-day limitations period (granted by § 706(e) to a charging party who has "initially instituted" state proceedings) in spite of the fact that the initial "filing" with the EEOC preceded the institution of proceedings before the State agency so that, in effect, the charging party "initially instituted" federal rather than state proceedings.

(2) Whether the Second Circuit erred in holding the Respondent's allegations of post-employment discrimination were within the scope of a reasonable EEOC investigation and, therefore, the district court could consider such claims, even though the EEOC charge specifically related only to allegations of discrimination during the period of the Respondent's employment, no notice was given to Mohasco of such allegations, and the EEOC's determination of no reasonable cause made no reference to such allegations.

STATUTES INVOLVED.

This case involves the interpretation and application of the provisions of Title VII of the Civil Rights Act of

1964 as amended, 42 U.S.C. §2000e *et seq.*, specifically Title VII § 706(c), 42 U.S.C. § 2000e-5(c) and Title VII § 706(e), 42 U.S.C. § 2000e-5(e). These statutory provisions are reproduced in full in Appendix B (App. A51 - A52).

STATEMENT OF THE CASE.

Respondent Ralph H. Silver (hereinafter "Silver") was employed by Mohasco on July 15, 1974. His employment relationship with Mohasco was terminated on August 29, 1975. Silver submitted a letter to the EEOC, which is shown to have been received by the EEOC on June 15, 1976, 291 days after Silver's termination. This letter alleged that Silver ". . . was both hired and fired because of [his] religion", and specifically detailed an alleged plan pursuant to which he claimed Mohasco had created the position to which he was hired as a ". . . ['minority slot'] to give token compliance with job anti-discrimination legislation. . .".

Because the New York State Division of Human Rights (hereinafter "Human Rights Division") is (and was at that time) a "706 Agency" under the EEOC's regulations, 29 C.F.R. § 1601.12(m) (1977), the EEOC forwarded Silver's letter to the Human Rights Division by Notice of Deferral Transmittal dated June 15, 1976. In apparent recognition of the unambiguous language of § 706(c) that ". . . no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law . . . ", the EEOC's Notice of Deferral included a statement that:

> "This charge is being deferred to your agency pursuant to Section 706(c) of Title VII of the Civil Rights Act of 1964, as amended. The Commission *will* automatically *file* this charge at the end of the deferral period, unless we are notified before the expiration of that period that your agency has terminated its proceedings."
>
> (Emphasis added.)

The Human Rights Division, by letter to Silver dated June 18, 1976, advised Silver of its receipt of his letter to the EEOC, and stated that:

> "You are invited to visit this or any other regional office of the Division to file a complaint."

and that:

> "It is requested that you file a complaint with this Division within 30 days."

On August 12, 1976, 55 days later and 349 days after the termination of his employment with Mohasco, Silver filed a verified complaint with the Human Rights Division alleging essentially the same claim of employment discrimination because of his religious faith as had been raised in his letter to the EEOC.

Sixty-six days after the EEOC mailed its "Notice of Deferral Transmittal" to the Human Rights Division, the EEOC, by Notice of Charge of Employment Discrimination dated August 20, 1976, notified Mohasco that Silver had filed a charge against Mohasco alleging employment discrimination under Title VII. *See* 29 C.F.R. § 1601.13 (1972) (respondent to be served by EEOC with copy of charge within 10 days of filing) and § 1601.12(b)(1)(iv) (1975) (60 day deferral period to commence upon EEOC mailing of charge to 706 Agency). That Notice showed only that Silver's charge related to a discharge from employment, because of Silver's religion, on August 29, 1975. By a form letter of the same date over the signature of Edwin C. Casler, the Regional Director, the EEOC notified Silver that the EEOC had sent such Notice to Mohasco.

By letter dated August 3[1], 1976 to Mr. Casler of the EEOC, Silver stated:

> "In reply to your letter dated August 20th, I am forwarding you a copy of my letter dated August 31 addressed to Mr. Dorman Avery of the State Division of Human Rights."

In this August 31 letter to the Human Rights Division, Silver stated, among other things:

> "I believe that I was given a bad reference by Mohasco. What exactly the reference was ought to be investigated."

The EEOC did not notify Mohasco of its receipt of this letter, and did nothing to indicate Silver had amended his original charge or had filed a new charge.

On February 9, 1977, the Human Rights Division issued its determination, which is reproduced in full in Appendix A herein (A45 - A46), that there was no probable cause to believe Mohasco had engaged in the unlawful discriminatory practice complained of by Silver. This determination states, in pertinent part:

> "Complainant herein alleges that he was terminated from employment because of his creed. Respondent has officers and upper/middle management personnel of complainant's stated religious faith. It cannot be ascertained that complainant's employment was terminated for reasons other than management's judgment that his job performance was unsatisfactory."
>
> (A45)

This determination was upheld by Order of the New York State Human Rights Appeal Board on December 22, 1977, which is reproduced in full in Appendix A herein (A47 - A48).

On August 24, 1977, the EEOC, over Mohasco's jurisdictional objection that Silver had failed to file a timely charge with the EEOC, issued its "no reasonable cause" determination, which is reproduced in full in Appendix A herein (A49 - A50). This determination states, in pertinent part:

"Substantial weight has been accorded the findings of the New York State Division of Human Rights, which are attached. Having examined the New York State Division of Human Rights' findings and the record presented, I conclude that there is not reasonable cause to believe the charge is true."

(A49)

On the same day, the EEOC mailed to Silver notification of his right to commence a civil action within ninety days of his receipt of such notice. Ninety-one days later, on November 23, 1977, Silver commenced this action by filing a complaint in the United States District Court for the Northern District of New York, citing Title VII as the sole basis for this action.

By Memorandum-Decision and Order dated October 17, 1978, the Honorable James T. Foley, of the United States District Court for the Northern District of New York, granted Mohasco's motion for summary judgment on the grounds that Silver failed to make a timely filing of his charge with the EEOC, and that the court therefore lacked subject matter jurisdiction with respect to Silver's claims against Mohasco.

Judge Foley also concluded that because Silver's charge sent to the EEOC and forwarded to the Human Rights Division did not allege a continuing or post-employment violation of Title VII, allegations in Silver's complaint of continuing and post-employment discrimination should be dismissed for lack of subject matter jurisdiction.

On appeal, a divided Second Circuit, on July 18, 1979, reversed the decision of the district court and held Silver's charge was timely filed with the EEOC. In this respect, Chief Judge Kaufman, writing for the majority, stated:*

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* Chief Judge Kaufman was joined in his opinion by Judge Oakes. Judge Meskill filed a separate opinion dissenting in part and concurring in part.

"We are of the view, however, that an informed reading of Title VII, consistent with its purpose, requires us to conclude that a charge is ' filed ' for purposes of § 706(e) when received, and ' filed ' as required by § 706(c) when the state deferral period ends."

(A29)

Further, the Second Circuit unanimously held that on remand the district court could properly consider Silver's allegations of "blacklisting" and post-employment discrimination. (A35-A36; A37-A38, n.2).

REASONS FOR GRANTING THE WRIT.

I. The "Filing" Issue.

A. A Clear Division of Opinion Exists Between the Circuit Courts of Appeal on the Issue of When a Charge is "Filed" With the EEOC.

Four other circuits have considered the precise timeliness question presented by this case. One Circuit has rendered a decision diametrically opposed to the view expressed by the court below. *Moore v. Sunbeam Corp.*, 459 F.2d 811 (7th Cir. 1972) (Stevens, J.). Three circuits have issued decisions that support the result rendered in the decision below. *See Vigil v. American Telephone & Telegraph Co.*, 455 F.2d 1222 (10th Cir. 1972); *Anderson v. Methodist Evangelical Hospital, Inc.*, 464 F.2d 723 (6th Cir. 1972); and *Richard v. McDonnell Douglas Corp.*, 469 F.2d 1249 (8th Cir. 1972). However, the Eighth Circuit, sitting *en banc*, has since rendered an opinion sharply retreating from its position in *Richard, supra. Olson v. Rembrandt Printing Co.*, 511 F.2d 1228 (8th Cir. 1975). These five decisions cannot be reconciled.

The Tenth Circuit, in *Vigil, supra*, 455 F.2d at 1224-25 held that: (1) the submission of a complaint to the EEOC during the deferral period provided by § 706(b) [now § 706(c)] fulfilled the requirement of § 706(d)

[now § 706(e)] that a charge be "filed" within 210 [now 300] days of the date of the unfair employment practice complained of, even though the EEOC could not proceed with its investigation until after the 706 Agency had had the complaint for 60 days; and (2) in any event, the submission "tolled" the running of the 210 day limitations period.

The Sixth and Eighth Circuits, when confronted with similar situations, followed *Vigil,* but *only* with respect to *Vigil's* holding that the submission of a charge to the EEOC before deferral to the 706 Agency "tolled" the running of the 210 day filing period then prescribed by § 706(d) [now § 706(e)]. *Anderson, supra,* 464 F.2d at 725 (6th Cir. 1972) ("Submission of the original charge tolled the 210 day time limit."); *Richard, supra,* 469 F.2d at 1251 (8th Cir. 1972) (" ... initial receipt of the original charges by the EEOC serves to toll the statute of limitations.").

However, an *en banc* Eighth Circuit, in *Olson, supra,* 511 F.2d at 1231-33 (8th Cir. 1975), has since substantially retreated from its decision in *Richard,* stating:

> "... [I]t would not be in keeping with the intent of Congress to allow one individual 300 days to file a charge because of the fortuitous circumstance that the state where the claim arose is a deferral state, when another individual in a non-deferral state will have only 180 days in which to file. The purpose underlying the extended period in a deferral state is to give the state agency an initial opportunity to process the claim without jeopardizing the federal right, not to extend by 120 days the time for assertion of this federal right.
>
> ...
>
> "The extended filing period was not intended as a bonus for complainants residing in a deferral state but as a means of effecting an

> accommodation between the federal right and the requirement of pre-amendment § [706(b)] of initial resort to an available state or local agency.
>
> "We are here concerned with amended Title VII. However, except for an enlargement of time for filing a charge from 90 to 180 days and concomitant extension of the deferral provision to 300 days, there were no substantive changes made in § [706(d)] (renumbered § [706(e)]).
>
> "Thus a charge of employment discrimination must be filed within 180 days whether or not the complainant is in a deferral state. If in a deferral state it must be filed with the state or local agency within 180 days. The complainant is then given the extended period for filing with the EEOC to allow him to pursue his state claim without waiving possible relief under the Federal Act."
>
> (Footnote omitted.)

The Seventh Circuit, in an opinion written by then-Judge Stevens, and closely tracked by the district court in the instant case (although specifically rejected by the majority in the Second Circuit decision below), has held that a charge originally submitted to the EEOC and referred to a 706 Agency need not be resubmitted, but may be held by the EEOC in "suspended animation" for the duration of the deferral period to be automatically "filed" with the EEOC after the expiration of that period. *Moore, supra,* 459 F.2d at 826. The *Moore* court specifically rejected the *Vigil* rationale. First, the Seventh Circuit rejected *Vigil's* holding that the EEOC could treat the charge as "filed" when received for § 706(e) purposes, but could defer processing the charge until the State 706 Agency had the opportunity to act required by § 706(c). *Moore* reasoned this holding in *Vigil* was inconsistent with the language and structure of Title VII as a whole, the

legislative history, and the Supreme Court's decision in *Love v. Pullman,* 404 U.S. 522 (1972). Next, *Moore* rejected *Vigil's* rationale that the submission of a charge to the EEOC "tolled" the extended limitations period, holding:

> "In our view the statute provides a basic limitations period of 90 [now 180] days, which may be extended (or 'tolled') to a maximum of 210 [now 300] days. We do not think that Congress intended a further extension (or a second 'tolling') to achieve the same purpose (time for state consideration) as the original enlargement of the 90-day period to 210 days in those states which have a Fair Employment Practices Agency. If Congress had so intended, we believe it would have included such a provision instead of the 210-day limitation. Moreover, the difficult questions of statutory construction will seldom arise if the complainant's original filing is within the basic 90-day period. Although we may share the EEOC's view that less diligence should have been required, we must respect the legislature's choice of the appropriate period of limitations, whether that choice was made to effectuate the policies of the Act or as an element of a compromise that enabled it to pass."
>
> (*Moore, supra,* 459 F.2d at 429-30.)

There are, thus, three separate views of the requirements of §§ 706(c) and (e) that have received specific judicial sanction from Courts of Appeals. *First,* there is the view espoused by the Eighth Circuit in *Olson*, that, to be timely, a charge must be "filed" either with the EEOC or with a State or local 706 Agency within 180 days of the alleged unlawful employment practice. *Second,* there is the view adopted by the Seventh Circuit in *Moore,* the district court below, and Judge Meskill in dissent from the Second Circuit opinion below, that the requirements of §§ 706(c) and (e) must be read literally, and that there is

but one "filing" date. Section 706(e) provides that, in a deferral state, a charge *may not be* "filed" with the EEOC until after the expiration of the mandatory deferral period, while at the same time § 706(c) requires that the charge in such a case *must be* "filed" within 300 days of the alleged unlawful discriminatory practice. *Finally,* the Second Circuit (in the case below), and the Tenth *(Vigil, supra),* Sixth *(Anderson, supra),* and, at one time, Eighth *(Richard, supra)* Circuits have held that if, in a deferral state, a charge is received by the EEOC within 300 days of the alleged unlawful employment practice, that charge is timely irrespective of whether State or local 706 Agency proceedings are instituted within that 300 day period.

This judicial confusion as to the proper interpretation of §§ 706(c) and (e) is also reflected in many opinions from Courts of Appeals considering related matters. For example, in *Doski v. M. Goldseker,* 539 F.2d 1326 (4th Cir. 1976), the Fourth Circuit considered a case involving a plaintiff who first instituted timely state proceedings 281 days after the alleged unlawful discriminatory act. The plaintiff in that case submitted a charge to the EEOC on the same day, and 284 days after the alleged discrimination the EEOC was notifed the State 706 Agency had terminated its proceedings. The court in *Doski,* in holding the charge to have been timely filed, specifically declined to follow *Olson,* saying:

> "On its face [§ 706(e)] requires only that proceedings be 'initially instituted' with the State or local agency. While it clearly states that unless this procedure is followed charges must be filed within 180 days with the EEOC, it does not on its face require or in any way intimate that charges with the State or local agency must be initially instituted *within 180 days."*
>
> *(Doski, supra,* 539 F.2d at 1329-30. Emphasis in original.)

The Ninth Circuit, in *Davis v. Valley Distributing Company,* 522 F.2d 827 (9th Cir. 1975), *cert. denied,* 429 U.S. 1090 (1977), in deciding whether the plaintiff's

submission to the EEOC was a timely "filing", and without citing *Moore,* said:

> "We conclude, therefore, that the applicable period for an initial filing with EEOC was 180 days ... and appellant's complaint was timely filed on the date when it was returned to EEOC's [sic] by the Arizona Commission and formally 'filed.' ... "
>
> (*Davis, supra,* 522 F.2d at 832.)

Finally, it is interesting to note that the Second Circuit itself, in *Weise v. Syracuse University,* 522 F.2d 397, 411 (2d Cir. 1975) has stated, in *dictum:*

> "If the alleged unlawful employment practice occurs within a state or locality having a law prohibiting such a practice, an aggrieved person cannot file a charge with the EEOC until 60 days have elapsed after the commencement of such state or local proceedings.... Resort to the EEOC *thereafter* is conditioned on the filing of charges not more than 300 days after the occurrence of the alleged unlawful practice or 30 days after the termination of state or local proceedings, whichever is earlier."
>
> (Footnote and citation omitted.)

It is apparent that confusion concerning the proper interpretation of § § 706(c) and (e) is rampant, and no clear trend in judicial thought is emerging. In fact, in considering a Title VII timeliness question similar to that presented by this case, one judge recently concluded:

> "The problem presented by this case has confused and bedeviled the courts for a number of years and promises to do so until either Congress or the Supreme Court speaks."
>
> (*Wiltshire v. Standard Oil Co. of California,* 447 F. Supp. 756 (N.D. Cal. 1978).)

This case presents this Court with an opportunity to end this confusion and to once and for all "set the record straight" as to the proper interpretation of § § 706(c) and (e).

B. The Decision of the Second Circuit Court of Appeals Is Contrary to the Prior Decisions of This Court.

The starting point for the analysis of the relevant decisions of this Court is *Love, supra.* In *Love,* the plaintiff submitted a "letter of inquiry" complaining of alleged discrimination to the EEOC prior to instituting State 706 Agency proceedings. The EEOC treated this letter as a complaint, but pursuant to the prohibition contained in § 706(c) [then § 706(b)], the EEOC *did not formally file the charge at that time.* Instead, the EEOC orally notified the State 706 Agency that it had received a complaint from the plaintiff. By letter to the EEOC, the State 706 Agency waived the opportunity to process the plaintiff's charge. The EEOC then investigated the complaint and issued a finding of reasonable cause, but was unable to obtain the defendant's voluntary compliance. This Court gave express approval to the procedure the EEOC followed in that case, saying:

> "We hold that the filing procedure followed here fully complied with the intent of the Act, and we thus reverse the judgment of the Court of Appeals. Nothing in the Act suggests that the state proceedings may not be initiated by the EEOC acting on behalf of the complainant rather than by the complainant himself, nor is there any requirement that the complaint to the state agency be made in writing rather than by oral referral. Further, we cannot agree with the respondent's claim that the EEOC may not properly hold a complaint in 'suspended animation,' automatically *filing it upon termination of the state proceedings."*
>
> *(Love, supra,* 404 U.S. 525-26. Emphasis added and footnotes omitted.)

It is important to note *Love* did not hold the EEOC could treat the plaintiff's charge as "filed" on receipt for § 706(e) purposes, but instead implicitly rejected such treatment. The defendant in *Love* argued that the EEOC's holding the plaintiff's charge in abeyance pending State agency proceedings was a nullity because the EEOC was required to view charges as being filed with the EEOC when they were received. In rejecting that contention, this court held:

> ". . . the statutory prohibition of 706(b) [now §706(c)] against filing charges that have not been referred to a state or local authority necessarily creates an exception to the regulation requiring filing on receipt."
>
> (*Love, supra,* 404 U.S. at 526, note 5.)

This Court's rejection of the concept that a charge is "filed" by the EEOC on receipt was expressly recognized by *Moore, supra,* 459 F.2d at 824, *Anderson, supra,* 464 F.2d at 725, *Richard, supra,* 469 F.2d at 1251, and the district court below (A16 - A17). Notwithstanding these authorities, the Second Circuit below held:

> "In our view, the clear import of *Love* is that a charge held, like Silver's, in 'suspended animation,' is 'filed' under § 706(e) when the EEOC *first* receives it, and not when the sixty-day period ends. As the *Love* Court noted, to construe the statute to require a second 'filing' after the state proceedings had concluded would create an additional procedural obstacle without advancing the purposes of the statute. 404 U.S. at 526-27. We therefore hold that Silver's charge was 'filed' under § 706(e) on June 15, 1976, 291 days after he was discharged and well within the 300-day limit. In sum, we believe the requirement in § 706(c) that no charge be 'filed' before the deferral period ends simply means that the EEOC may not process a Title VII complaint until sixty days after it has been deferred to a state agency."
>
> (A30 - A31; footnotes omitted.)

In a footnote, the court explained:

> "Although there is language in *Love* that can be construed as suggesting that a charge is 'filed' after the sixty-day period ends, *see, e.g.,* 404 U.S. at 526 & n.5; *Moore, supra,* 459 F.2d at 824, this reading is contradicted both by the passage cited in text and by the 'clear import' of the Court's analysis. *Vigil v. American Telephone & Telegraph Co.,* 455 F.2d 1222, 1224 (10th Cir. 1972)."
>
> (A31, n.13)

It appears that the Second Circuit below, which ignores the clear and unambiguous wording of the statute, also prefers the "clear import" of a Supreme Court decision to the actual language of that decision.

Another decision of this Court important to the resolution of this case is *Electrical Workers v. Robbins & Myers, Inc.,* 429 U.S. 229 (1976). In *Electrical Workers,* a Title VII plaintiff contended that the limitations period of § 706(d) [now § 706(e)] had been tolled by his initiation of a grievance proceeding pursuant to a collective bargaining agreement. In rejecting that contention, this Court stated that:

> ". . . Congress has already spoken with respect to what it considers acceptable delay when it established a 90- [now 180-] day limitations period, and gave no indication that it considered a 'slight' delay followed by 90 days equally acceptable. *In defining Title VII's jurisdictional prerequisites 'with precision,'* [citations omitted], *Congress did not leave to courts the decision as to which delays might or might not be 'slight'."*
>
> *(Electrical Workers, supra,* 429 U.S. at 240. Emphasis added.)

In commenting upon the extended limitations period of § 706(d) [now § 706(e)] where a claim of discrimination is commenced before a State or local agency, this

Court stated that :

> "Where Congress has spoken with respect to a claim much more closely related to the Title VII claim than is the contractual claim pursued under the grievance procedure, *and then firmly limited the maximum possible extension of the limitations period applicable thereto,* we think that all of petitioner's arguments taken together simply do not carry sufficient weight to overcome the negative implications from the language used by Congress [citation omitted]."
>
> *(Electrical Workers, supra,* 429 U.S. at 240. Emphasis added.)

Thus, this Court has severly limited the application of the "tolling" rationale, which was essential to the *Anderson* and *Richard* decisions and which was one of the alternative bases for the *Vigil* decision, and has strongly suggested that rationale is inapplicable to the facts presented in this case. However, the court below avoided this issue by stating:

> "We do not reach the question, decided affirmatively by [the Sixth, Eighth and Tenth] circuits, whether initial receipt of the charge by the EEOC 'tolls' the § 706(e) statute of limitations. Rather, we interpret § 706(c) in a manner consistent with the result reached in *Vigil, Anderson,* and *Richard.* Moreover, we note that the Tenth Circuit employed our statutory construction as an alternative ground in *Vigil, supra,* 455 F.2d at 1224."

Finally of interest is *Oscar Mayer & Co. v. Evans,* ___ U.S. ___, 60 L.Ed.2d 609 (1979). *Oscar Mayer* dealt with the timeliness of a charge filed under the Age Discrimination in Employment Act of 1967 ["ADEA"], and held:

> ". . . that § 14(b) [of the ADEA] mandates that a grievant not bring a suit in federal court under § 7(c) of the ADEA until he has first resorted to appropriate state administrative proceedings. We also hold, however, that the grievant is not required to commence the state proceedings within time limits specified by state law."
>
> *(Oscar Mayer, supra;* ___ U.S. at ___, 60 L. Ed. 2d at 614.)

The court below considered *Oscar Mayer* as supportive of its conclusion Silver's charge was timely filed with the EEOC. And, while it is true that ADEA § 14(b) is patterned after and is virtually *in haec verba* with Title VII § 706(c), the ADEA differs from Title VII in one important way not considered by the court below: the ADEA has no provision analagous to the one contained in Title VII § 706(e) that the extended 300 day filing period is available *only* to an aggrieved person who has *initially instituted* state proceedings. It is correct that *Oscar Mayer* would support the position that the EEOC's mailing of a discrimination charge to a State 706 Agency "commences" state proceedings for § 706(c) deferral purposes *(see Oscar Mayer, supra,* ____ U.S. at ___, 60 L.Ed.2d at 618-19). However, assuming, *arguendo,* that the Second Circuit was correct in holding that "filing" means one thing in § 706(c) and another in § 706(e) and that the charge was "filed" with the EEOC when received for § 706(e) purposes, then Silver "initially instituted" *federal proceedings* rather than state proceedings and is entitled only to the 180-day filing period rather than the 300-day period.

C. The Decision of the Second Circuit Court of Appeals Is Contrary to the Plain Language of Section 706(c) of Title VII.

The court below admittedly eschewed the literal meaning of Section 706(c) in favor of what it viewed to be the "fundamental policies embodied in Title VII". (A28 - A29). As recognized by the *Moore* court and Judge Meskill in dissent below, the meaning of these two sections is clear and unambiguous. Judge Meskill dissenting from the decision below, explained it thus:

"Despite the much-emphasized complexity of Title VII, there is no dispute over the literal meaning of the two statutory provisions under examination. Section 706(c), the deferral provision, provides that in a state that has created an agency to hear employment discrimination claims (a 'deferral state'), no charge may be filed with the EEOC until 60 days or 120 days (depending on how long the state agency has been in existence) after state proceedings have been commenced, unless such state proceedings have been earlier terminated. Section 706(e), the limitations provision, provides that charges must be filed with the EEOC within 180 days of the alleged unlawful employment practice, except that where an aggrieved party has *initially instituted* state proceedings, a charge must be filed with the EEOC within 300 days of the alleged unlawful practice. [Emphasis added.]

"The purposes behind these provisions are every bit as clear as their literal meanings. In *Love v. Pullman Co.*, 404 U.S. 522, 526 (1972), a unanimous Supreme Court explicitly stated that the purpose of Title VII's deferral provision is 'to give state agencies a prior opportunity to consider discrimination complaints' while the purpose of the limitations provision is 'to ensure expedition in the filing and handling of those complaints.' Not surprisingly, the scheme enacted by Congress effectuates these two different goals by imposing two different requirements on those who seek to invoke the remedial provisions of Title VII. Thus, a charge *must not* be filed with the EEOC until after the expiration of the mandatory deferral period (or termination of state proceedings), yet a charge *must* be filed with the EEOC within 300 days of an alleged unlawful employment practice. As a practical matter, a person who complains to the EEOC within 180 days of an alleged illegal employment practice can be sure of neither tripping on the deferral threshold nor bumping against the limitations ceiling. Regardless of whether the relevant state has created an

agency to which deferral is necessary, and regardless of how long any such agency has been in existence, and regardless of how quickly any such deferral agency terminates its proceedings, the complaint will be timely."

(A38 - A39)

The *Moore* court reached the same conclusion for the same reason -- it is what the statute provides. *Moore, supra,* 459 F.2d at 821-22.

The majority of the court below, however, preferred the "purpose" of Title VII to its language, saying:

"Confronted with [the provisions of §§ 706 (c) and (e)], the able district court judge read § 706(c) literally. He reasoned that even when a charge is received by the EEOC well within 300 days of the alleged discrimination, it cannot be considered 'filed' with that office until sixty days after referral to the state agency. Thus, according to Judge Foley, Silver's charge, albeit received by the EEOC 291 days after his discharge, was not 'filed' before August 14, 1976, 352 days subsequent to the termination of his employment. Accordingly, Judge Foley determined that Silver was barred by the 300-day jurisdictional prerequisite of § 706(e).

"The district court decision would, therefore, require a Title VII complainant to file his charge with the state agency within 240 days of discharge or forfeit the opportunity to bring his complaint before the EEOC. We are of the view, however, that an informed reading of Title VII, consistent with its purpose, requires us to conclude that a charge is 'filed' for purposes of § 706(e) when received, and 'filed' as required by § 706(c) when the state deferral period ends."

(A28 - A29; footnote omitted.)

It is respectfully submitted that where Congress has spoken in clear and unambiguous terms, and the legislative history does not provide firm evidence the statute cannot mean what it so clearly seems to say *(cf. Occidental Life Insurance Co. v. EEOC,* 432 U.S. 355, 361 (1977)), then it is not the place of the judiciary to substitute its judgment for that of Congress as to what the words in question mean, and that the Second Circuit below erred in doing just that.

It is thus clear that the Second Circuit erred in holding that a charge is "filed" for § 706(e) purposes upon receipt by the EEOC, but "filed" for § 706(c) purposes upon the expiration of the deferral period. Further, the Second Circuit also erred in holding Silver's charge to have been timely filed even though State 706 Agency proceedings were not "initially instituted", and the § 706(c) deferral period did not end, until well after the extended 300 day limitations period provided for by § 706(e). These holdings are contrary to the plain language of the statute, as the Second Circuit itself conceded, and are not supported by the legislative history or prior decisions of this Court.

II. The "Blacklisting" Issue.

A. The Decision of the Second Circuit Court of Appeals is Contrary to Prior Decisions of Other Circuit Courts of Appeals.

Although this Court has never specifically considered whether Title VII encompasses post-employment discrimination, the Circuit Courts of Appeals which have addressed this issue all agree that the scope of Title VII is sufficiently broad to provide a remedy for post-employment discrimination. *See Pantchenko v. C. B. Dolge Company,* 581 F.2d 1052 (2d Cir. 1978) (bad references by former employer cognizable as "employment discrimination"); *Shehadeh v. Chesapeake and Potomac Telephone Co.,* 595 F.2d 711 (D.C. Cir. 1978) (untrue and damaging references by former employer cognizable as "employment discrimination"); *Rutherford v. American Bank of Commerce,* 565 F.2d 1162 (10th Cir. 1977) (bad references by former employer cognizable as "retaliation" for filing charge with EEOC).

The Courts of Appeals are also generally in agreement that the proper scope of a Title VII charge is limited to the scope of the EEOC investigation reasonably expected to grow out of the charge of discrimination. *See e.g., Tipler v. E. I. duPont de Nemours & Co.,* 443 F.2d 125 (6th Cir. 1971); *Oubichon v. North American Rockwell Corp.,* 482 F.2d 569 (9th Cir. 1973); *Jenkins v. Blue Cross Mutual Hospital Ins., Inc.,* 538 F.2d 164 (7th Cir. 1976) *(en banc), cert. denied,* 429 U.S. 986 (1976); *Sanchez v. Standard Brands, Inc.,* 431 F.2d 455 (5th Cir. 1970). This rule is regarded as serving two purposes: (1) it permits the effective functioning of Title VII where the persons filing charges are not trained legal technicians; and (2) subsequent civil litigation is more intimately related to the EEOC investigation than to the words of the charge that triggered the investigation. *See EEOC v. Bailey Co., Inc.,* 563 F.2d 439 (6th Cir. 1977), *cert. denied,* 435 U.S. 915 (1978). At least one Circuit, however, has attempted to further Title VII's goal of voluntary compliance, and to protect the rights of the party accused of discriminatory conduct, by limiting the scope of subsequent judicial proceedings to the scope of any discrimination contained in the charge or developed in the course of a reasonable EEOC investigation, provided such discrimination was included in the EEOC's reasonable cause determination and was followed by compliance with Title VII's conciliation procedures. *EEOC v. General Electric Co.,* 532 F.2d 359, 366 (4th Cir. 1976). *Accord EEOC v. Greyhound Lines,* 411 F. Supp. 97, 100-102 (W.D. Pa. 1976); *EEOC v. East Hills Ford Sales, Inc.,* 445 F. Supp. 985, 987 (W.D. Pa. 1978).

It should be noted that in this case there was no independent EEOC investigation at all, and no reference in the EEOC's reasonable cause determination to Silver's "blacklisting" allegations.

The Second Circuit below, reversing the lower court, held that the district court had jurisdiction to consider Silver's claims of "blacklisting" and bad references on the basis they were within the scope of a reasonable EEOC investigation. (A35 - A36; A37 - A38). This holding appears to ignore the undisputed facts that the EEOC never conducted any investigation of, nor attempted to conciliate, any aspect of Silver's charge. Mohasco never received *any* notice that Silver had attempted to place

allegations of "blacklisting" before the EEOC, and the EEOC's determination that there was no reasonable cause to believe Silver's charges to be true did not refer to blacklisting and, in fact, referred only to the Human Rights Division's finding of no probable cause which in turn dealt solely with Silver's allegations of discriminatory discharge.

The Second Circuit's decision that Silver may maintain his action against Mohasco with respect to his allegations of post-employment discrimination contrasts sharply with several cases where a court has not permitted a charging party to assert in his judicial complaint a different basis for alleged discriminatory conduct than that asserted before the EEOC. *See EEOC v. Bailey Co., Inc., supra,* 563 F.2d at 448-450 (allegations of religious discrimination not within scope of reasonable EEOC investigation of sex discrimination charge); *EEOC v. New York Times Broadcasting Service, Inc.,* 364 F. Supp. 651, 653-54 (W.D. Pa. 1973) (allegations of racial discrimination not within scope of reasonable EEOC investigation into sex discrimination charge); *Fix v. Swinerton and Walberg Co.,* 320 F. Supp. 58, 59 (D. Colo. 1970) (allegations of religious discrimination stricken where only allegations of national origin were disclosed to EEOC); *McCraz v. Standard Oil Co. (Indiana),* 76 F.R.D. 490, 497-98 (N.D. Ill. 1977) (allegations of discrimination on basis of sex, national origin or other unspecified and forbidden criteria stricken as not within scope of reasonable EEOC investigation of race discrimination charge). *But see Sanchez v. Standard Brands, supra* (allegations of national origin made in amended charge related back to original charge of sex discrimination). In this case, Silver is not merely asserting a new motivation as the basis for allegedly unlawful discriminatory conduct, but is asserting a wholly different type of discrimination than anything Mohasco ever received notice of or the EEOC considered in its no reasonable cause determination.

As the District of Columbia Circuit in *Shehadeh, supra,* concluded, allegations of disparaging references are new and independent acts of discrimination, distinct from an allegation of discriminatory discharge. In *Shehadeh, supra,* the District of Columbia Circuit considered a Title VII action alleging "blacklisting" where the aggrieved party had filed several EEOC charges, four of them specifically stating the defendant had given her a bad reference. In considering whether these bad references were merely a "natural outgrowth" of the original termination, the Court said:

> "Appellant alleged that pejorative references were distributed deliberately and for invidious reasons. Her charges reflect a conviction that certain critically-situated personnel at C&P of Maryland harbor an ongoing discriminatory animus toward her. And the record, though sparse at this juncture, evinces her attempt to establish that such personnel communicated with prospective employers. If, as appellant avers, *untrue* and damaging accounts of her employment qualifications were purposefully circulated in consequence of her gender or her husband's ancestry, they were new and independent acts of discrimination, and the 'natural outgrowth' of her dismissal would have been appreciably surpassed. Though the discharge and the disparaging references assertedly may have been prompted by the same discriminatory state of mind, that would not reduce the references to mere effects of the firing."
>
> *(Shehadeh, supra,* 595 F.2d at 719-20. Emphasis in the original; footnotes omitted.)

The Second Circuit below also implicitly rejected, without citation, *Ferguson v. Mobil Oil Corp.,* 443 F. Supp. 1334 (S.D. N.Y. 1978). There, the plaintiff alleged in his Title VII civil action that, following his discharge by Mobil, he was discharged from subsequent employment and rejected by a potential employer as the result of information supplied by Mobil. As in this case, the plaintiff alleged that such acts resulted in his continuing unemployment. The district court granted the defendant's motion to dismiss the plaintiff's blacklisting allegation on the ground that it was not included in the charge the plaintiff had filed with the EEOC.

> ". . . It is clear that this Court can take cognizance of averments of discrimination which are 'like or reasonably related to the allegations of

> the charge [submitted to the EEOC] and growing out of such allegations,' [citations omitted]. However, the 'blacklisting' claim at issue here cannot be so construed. This claim was never the subject of any discussion or investigation by the EEOC or the parties before it, demonstrating no notice thereof to the defendant and no reasonable relation to the charges investigated. . . ."
>
> (*Ferguson, supra,* 443 F. Supp. at 1337.)

Furthermore, in rejecting the plaintiff's contention that the blacklisting allegation "reasonably grew out of the fact that he was a victim of disparate treatment by Mobil" during his employment, the Southern District viewed the plaintiff's alleged discriminatory discharge from employment as fundamentally different from the alleged "blacklisting":

> ". . . The 'blacklisting' averment involves only that period *after* said employment when the employer/employee status, and its concomitant rights and duties, had expired and an entirely different legal context had arisen. Not only do the two periods involve distinct factual theatres, but also distinct legal obligations only the earlier of which was before the EEOC. . . ."
>
> (*Ferguson, supra,* 443 F. Supp. at 1337-38. Emphasis in the original.)

Traditionally, the courts have interpreted Title VII's procedural mandates with extreme liberality. *See* e.*g., Egelston v. State University College at Geneseo,* 535 F.2d 752 (2d Cir. 1976); *Weise v. Syracuse University, supra; Sanchez v. Standard Brands, Inc., supra.* Nonetheless, these procedures do embody Congress' judgment as to the due process requirements appropriate for such administrative proceedings. As stated by the Sixth Circuit in *EEOC v. Bailey Co., Inc., supra,* 563 F.2d at 450, a case dealing with the proper scope of the judicial complaint in an EEOC-initiated lawsuit:

> "Finally, we believe that our position in the present case is supported by the concern expressed in Congress that due process safeguards be built into the statutory scheme of Title VII. Remarks of Congressman Quie, House Debate on H.R. 1746, 92d Cong., 1st Sess., 117 Cong.Rec. 31962 (Sept. 15, 1971); S.Rep.No. 92-415, 92nd Cong., 1st Sess. 25 (1971). Although neither the statutory language nor the legislative history directly address the question before us, it is clear that the requirement in § 703 of Title VII, 42 U.S.C. § 2000e-2, of timely notice to an employer of a charge filed with the EEOC alleging employment discrimination embodies due process guaranties. *New Orleans Public Service, Inc. v. Brown,* 369 F.Supp. 702, 710 (E.D.La.1974). If an EEOC investigation of an employer uncovers possible unlawful discrimination of a kind not raised by the charging party and not affecting that party, then the employer should be given notice if the EEOC intends to hold the employer accountable before the EEOC and in court.
>
> "We are unable to accept the EEOC's argument that it was immaterial that appellee received notice and opportunity to comment at the time the EEOC issued its reasonable cause determination and during conciliation rather than before the issuance of the reasonable cause determination. While a court might conclude that the Due Process Clause of the Fifth Amendment was not violated by the procedure followed by the EEOC in the present case, our concern is with the legislative judgment of due process incorporated into the specific statutory scheme of Title VII. Evidence of that legislative intent indicates a concern for fair treatment of employers."

Where, as here, a complainant has merely forwarded a copy of a letter to the EEOC without any indication that it is to be viewed as a new charge or an amendment to a prior charge *(cf. Moore, supra,* 459 F.2d at 822), the

EEOC does not treat such letter as a new charge or as an amendment to a previous charge, or otherwise give notice of its existence to the respondent, and the EEOC does not investigate, attempt to conciliate, or include in its no reasonable cause determination the substance of such letter, then permitting the complainant to pursue the claims contained in such letter would violate traditional notions of due process and fair play.

B. The Decision of the Second Circuit Court of Appeals is Contrary to Prior Decisions of This Court.

This Court has had occasion to address the notice requirements of Title VII § 706(b). In *Occidental Life Insurance Co. v. EEOC, supra,* this Court considered what time limitation, if any, is imposed on the EEOC's power to bring suit against a private employer. After holding the only statute of limitations was directed to the period preceding the filing of an initial charge, the court said:

> "The absence of inflexible time limitations on the bringing of lawsuits will not, as the company asserts, deprive defendants in Title VII civil actions of fundamental fairness or subject them to the surprise and prejudice than can result from the prosecution of stale claims. Unlike the litigant in a private action who may first learn of the cause against him upon service of the complaint, the Title VII defendant is alerted to the possibility of an enforcement suit within 10 days after a charge has been filed. This prompt notice serves, as Congress intended, to give him an opportunity to gather and preserve evidence in anticipation of a court action.
>
> "Moreover, during the pendency of EEOC administrative proceedings, a potential defendant is kept informed of the progress of the action. Regulations promulgated by the EEOC require that the charged party be promptly notified when a determination of reasonable cause has been made, 29 CFR § 1601.19b(b)(1976),

> and when the EEOC has terminated its efforts to conciliate a dispute, § § 1601.23, 1601.25."
>
> *(Occidental Life, supra,* 432 U.S. at 372-73, footnote omitted.)

In this case, Mohasco never received notice of Silver's blacklisting claims from the EEOC. The EEOC never notified Mohasco that Silver had filed a new charge or amended his charge, and the "no reasonable cause" determination did not make any reference to allegations of post-employment discrimination. In fact, Mohasco did not learn that Silver had mailed to the EEOC a copy of his August 31, 1976 letter to the Human Rights Division until Mohasco obtained a copy of the EEOC's file in December, 1977, long after the Human Rights Division and EEOC proceedings were concluded, and after this action was commenced.

Further, Silver's letter did not definitely allege blacklisting charges but merely suggested such practices might have taken place and suggested that the Human Rights Division investigate them. Apparently, the EEOC did not consider its copy of that letter to be a charge and therefore did not institute an investigation into, or notify Mohasco of, the allegations contained in it.

Thus, it is submitted, the Second Circuit's decision that Silver can nonetheless litigate his claims of post-employment discrimination raises substantial questions which should be considered by this Court.

CONCLUSION

For all of the foregoing reasons, we respectfully request that a writ of certiorari be issued to review the judgment and decision of the United States Court of Appeals for the Second Circuit in this case.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

RALPH H. SILVER,
Plaintiff,

-against- **77-CV-472**

MOHASCO CORPORATION;
EDWARD CURREN;
RAYMOND GREENHILL;
FREDERICK WOLLER;
HERBERT BROWN;
AND JAMES CULLEN
Defendants.

JAMES T. FOLEY, D. J.

MEMORANDUM-DECISION and ORDER

This is a private "complaint" suit instituted pursuant to the Civil Rights Act of 1964, Title VII, § § 701 *et seq.*, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § § 2000e *et seq.*, alleging employment discrimination on the basis of religion. *See* 42 U.S.C. § 2000e-2. Plaintiff Ralph H. Silver was employed by defendant Mohasco Corporation, a New York corporation with offices in Amsterdam, New York, on July 15, 1974, in the capacity of Senior Marketing Economist. It is alleged that during his employment, plaintiff was mentally abused, deceived, pressured, and coerced by defendant Mohasco Corporation as well as by defendants Edward Curren, Raymond Greenhill, Frederick Woller, Herbert Brown, and James Cullen, individually and in their capacities as officials and employees of Mohasco Corporation, in an attempt to force plaintiff to resign because he was of the Jewish religion.

Plaintiff alleges that the individual defendants conspired with each other on behalf of defendant Mohasco Corporation to organize and implement a purposeful plan of discrimination and harassment, referred to as the "Woller Plan" in plaintiff's complaint, to be directed against persons of minority groups and religions. More specifically, plaintiff alleges that these defendants conspired to employ members of minority groups and religions as token employees in an attempt to defraud and mislead governmental agencies, the public, and the shareholders of defendant Mohasco Corporation by making it appear that Mohasco Corporation was an equal opportunity employer. It is alleged that this plan

called for the hiring of token employees -- to be followed by harassment to force their resignation. Thus, plaintiff asserts that he was both hired and fired solely because of his religious beliefs.

Plaintiff further alleges that despite the continuing harassment by the defendants he refused to resign. On August 29, 1975, plaintiff was discharged by defendant Mohasco Corporation. Plaintiff asserts that his discharge was without warning, in spite of his efforts to perform satisfactorily, and on account of his religious beliefs. In addition, plaintiff alleges that since his termination of employment with defendant Mohasco Corporation the defendants have made false, derogatory, and malicious accusations to prospective employers of the plaintiff when asked for a reference, thereby causing plaintiff to remain unemployed.

On June 15, 1976, the Equal Employment Opportunity Commission ("EEOC") received a letter written by the plaintiff asserting a charge of discrimination. *See* 29 C.F.R. § 1601.11(b) (1977). This letter was forwarded to the New York State Division of Human Rights, which on February 9, 1977, found that there was no probable cause to believe that Mohasco Corporation had engaged in an unlawful discriminatory practice with respect to the plaintiff. Subsequent to its deferral to the Division of Human Rights, the EEOC began processing plaintiff's charge of discrimination. On August 24, 1977, the EEOC ended its investigation with a finding that there was no reasonable cause to believe that plaintiff had been discriminated against and issued a notice of right to sue. Thereafter, on November 23, 1977, plaintiff commenced this lawsuit.

Plaintiff seeks an injunction against the continuing unlawful employment practices of the defendants, compensatory damages against all defendants, jointly and severally, in the sum of $100,000.00, punitive damages against defendant Mohasco Corporation in the sum of $1,000,000.00 and each individual defendant in the sum of $100,000.00, and such other and further relief as the Court deems just and equitable. *See, e.g., Curtis v. Loether,* 415 U.S. 189, 196-97 (1974); *Pearson v. Western Electric Co.,* 542 F.2d 1150, 1151-52 (10th Cir. 1976).

It appears that plaintiff has also commenced an action in the courts of the State of New York for money damages in the millions against these same defendants. That action is apparently based on allegations of fraud, intentional infliction of emotional harm, libel, slander, invasion of privacy, and violation of plaintiff's civil rights. (Affidavit

of Warner M. Bouck, Exhibit 1, filed January 27, 1978).

Now before this Court is a motion to dismiss, Fed. R. Civ. P. 12(b), on behalf of the individual defendants Curren, Greenhill, Woller, Brown, and Cullen on the grounds of lack of jurisdiction over the subject matter and failure to state a claim upon which relief can be granted. Also before the Court is a separate motion on behalf of defendant Mohasco Corporation for summary judgment, Fed. R. Civ. P. 56, on the ground, *inter alia,* that this Court lacks jurisdiction over the subject matter because plaintiff failed to make a timely filing of his grievance with the EEOC as required under Title VII.

I

The basis of the individual defendants' motion to dismiss is plaintiff's failure to name them as respondents in his charge filed with the EEOC. It is axiomatic that a jurisdictional prerequisite to the commencement of a "complaint" suit under Title VII is the filing of a charge with the EEOC. This requirement not only puts the respondent named in the charge on notice of the alleged violation, but also permits the EEOC to go forward with attempts at conciliation or voluntary compliance before the filing of a judicial complaint. Defendants Curren, Greenhill, Woller, Brown, and Cullen contend that plaintiff's failure to name them as respondents in the proceeding before the EEOC deprives this Court of subject-matter jurisdiction over any claim asserted against them in this lawsuit.

It is clearly evident that plaintiff's verified complaint filed with the New York State Division of Human Rights named only Mohasco Corporation as a respondent. (Memorandum in Support of Motion to Dismiss the Complaint by Defendants Curren, Greenhill, Woller, Brown and Cullen, Exhibit C, filed January 27, 1978). Moreover, plaintiff's Title VII charge that was filed with the EEOC based on plaintiff's letter received by the EEOC on June 15, 1976, and correspondence relating thereto not only fail to mention defendants Brown and Cullen at all but characterize only Mohasco Corporation as a respondent. (*Id.*, Exhibits A, B, D, F(1) & F(2)).

Title VII clearly states that, in cases dealing with private sector employers, if the EEOC dismisses a charge or does not enter into a conciliation agreement with the respondent or does not file a civil action on behalf of the charging party within a certain time period, then the EEOC

shall notify the person aggrieved that

> a civil action may be brought *against the respondent named in the charge* . . . by the person claiming to be aggrieved . . .

within 90 days of the giving of such notice. 42 U.S.C. § 2000e-5(f)(1) (emphasis added). It is undisputed that the individual defendants named in this lawsuit were not sent notices by the EEOC with regard to plaintiff's charge of discrimination, *see* 42 U.S.C. § 2000e-5(b); 29 C.F.R. § 1601.13 (1977), and that plaintiff's right to sue letter named only Mohasco Corporation as a respondent, *see* 42 U.S.C. § 2000e-5(f)(1); 29 C.F.R. § 1601.25 (1977). Furthermore, the record of the proceedings before the EEOC does not show that an investigation was conducted or that a determination was made by the EEOC with respect to the individual defendants named in this lawsuit.

It is important to note, however, that defendants Curren, Woller, and Greenhill are referred to in plaintiff's letter to the EEOC that alleged a violation of his Title VII rights. Nonetheless, in my opinion, the scant references to these individuals in plaintiff's letter can be read and viewed only as asserting that they acted in their corporate capacities on behalf of Mohasco Corporation and in pursuit of corporate objectives. This position is further supported by statements found in plaintiff's letter to the EEOC such as *"Mohasco* created the economist position to give token compliance with job anti-discrimination legislation." (Memorandum in Support of Motion to Dismiss the Complaint by Defendants Curren, Greenhill, Woller, Brown and Cullen, Exhibit A, filed January 27, 1978) (emphasis added).

Furthermore, in my judgment, a substantial identity does not exist between defendant Mohasco Corporation and the five individuals named as additional defendants in this civil action to warrant an exception to the general rule that only those parties named in the charge before the EEOC can be brought before a federal district court in a private "complaint" action. *See, e.g., Chastang v. Flynn & Emrich Co.*, 365 F. Supp. 957, 964 (D. Md. 1973), *aff'd*, 541 F.2d 1040 (4th Cir. 1976).

No determination or attempts at conciliation or voluntary compliance could have been made with respect to these individuals in plaintiff's proceeding before the EEOC solely because of plaintiff's failure to object to the

omission of these individuals as named respondents in his charge filed with the EEOC. *See Bryant v. Western Electric Co.*, 572 F.2d 1087 (5th Cir. 1978)(per curiam). Thus, in my judgment, plaintiff's claim against defendants Curren, Greenhill, Woller, Brown, and Cullen must be dismissed because plaintiff did not name these individuals as respondents in his EEOC charge and because plaintiff did not pursue administrative relief with respect to these individuals prior to the commencement of this civil action. *See. e.g., Love v. Pullman Co.*, 404 U.S. 522, 523 (1972); *Beverly v. Lone Star Lead Construction Corp.*, 437 F.2d 1136, 1139-40 (5th Cir. 1971); *Travers v. Corning Glass Works*, 76 F.R.D. 431, 432-33 (S.D.N.Y. 1977).

It is clear to my mind that the tenor of plaintiff's charge filed with the EEOC was directed solely against his corporate employer. Evidently, this also was the view of the EEOC. While recognizing the liberality with which a court must view the procedural requirements of Title VII in favor of a charging party, *e.g., Smith v. American President Lines, Ltd.*, 571 F.2d 102, 105 (2d Cir. 1978); *Egelston v. State University College*, 535 F.2d 752, 754-55 (2d Cir. 1976); *Weise v. Syracuse University*, 522 F.2d 397, 411-12 (2d Cir. 1975), I do not believe that this "liberality" should be carried to its extreme at the expense of the rights of an individual alleged to have violated federal antidiscrimination laws. Such a policy, under the circumstances of this case, would, in my judgment, circumvent the statutory requirements of notice and opportunity to engage in meaningful conciliation efforts. A plaintiff, especially one such as the plaintiff in this lawsuit who has had two years of law school training and who had benefit of the advice of counsel at some point during the pendency of his charge before the EEOC, should not be given a blanket reprieve from failing to abide by important statutory jurisdictional requirements.

Viewing plaintiff's complaint in a light most favorable to his position, as I must at this stage of litigation, the conclusion is still inescapable that plaintiff's failure to name defendants Curren, Greenhill, Woller, Brown, and Cullen as respondents in his Title VII charge filed with the EEOC was not a mere technicality but a fatal flaw warranting dismissal of his claim as against these individual defendants in this lawsuit on the ground of lack of jurisdiction over the subject matter. *See, e.g., Sabala v. Western*

Gillette, Inc., 516 F.2d 1251, 1254 (5th Cir. 1975), *vacated & remanded on other grounds*, 431 U.S. 951 (1977); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 719 (7th Cir. 1969); *Stebbins v. Nationwide Mutual Insurance Co.*, 382 F.2d 267, 268 (4th Cir. 1967)(per curiam), *cert. denied*, 390 U.S. 910 (1968); *Plummer v. Chicago Journeyman Plumbers' Local 130*, 452 F. Supp. 1127, 1133-35 (N.D. Ill. 1978); *Travers v. Corning Glass Works, supra; Harris v. Commonwealth of Pennsylvania*, 419 F. Supp. 10, 13 (M.D. Pa. 1976); *Scott v. University of Delaware*, 385 F. Supp. 937, 941-42 (D. Del. 1974).

II

Defendant Mohasco Corporation moves for summary judgment and dismissal of plaintiff's complaint on the ground, among others, that this Court lacks jurisdiction over the subject matter because plaintiff failed to make a timely filing of his charge with the EEOC as required under Title VII. Thus, the procedural history of this case is, for present purposes, of primary importance and must be detailed.

Plaintiff's first act, with regard to his claim of discrimination, was the submission of a letter to the EEOC, which was received on June 15, 1976, 292 days after his discharge. In general, Title VII provides that if an alleged unlawful employment practice occurs in a state which has an agency that can grant relief from such a practice, a charging party is required to first file a complaint with such agency and can file a charge with the EEOC only after the passage of 60 days from the commencement of proceedings in the state agency or termination of such proceedings, whichever is earlier. Civil Rights Act of 1964, Title VII, § 706(c), *as amended*, 42 U.S.C. § 2000e-5(c). The New York State Division of Human Rights is such a so-called "706 agency" under regulations promulgated by the EEOC. 29 C.F.R. § 1601.12(m)(1977). Therefore, the EEOC immediately forwarded plaintiff's letter to the New York State Division of Human Rights together with a notice of deferral that stated:

> This charge is being deferred to your agency pursuant to Section 706(c) [42 U.S.C. § 2000e-5(c)] of Title VII of the Civil Rights Act of 1964, as amended. The Commission will automatically file this charge at the expiration of the deferral

> period, unless we are notified before the expiration of that period that your agency has terminated its proceedings.

(Motion for Summary Judgment, Exhibit B, filed February 14, 1978).

By letter dated June 18, 1976, the Division of Human Rights advised the plaintiff of its receipt of his letter to the EEOC and requested that he file a complaint with them within 30 days. On August 12, 1976, 55 days after transmittal of this letter by the Division of Human Rights, plaintiff filed a verified complaint with the Division of Human Rights charging that he had been discharged on August 29, 1975, by Mohasco Corporation on account of his religion. (Motion for Summary Judgment, Exhibit D, filed February 14, 1978). Thereafter, on August 20, 1976, 66 days after receiving plaintiff's letter charging an unlawful employment practice, the EEOC notified the president of Mohasco Corporation that plaintiff had filed a charge of employment discrimination against the corporation. *(Id.*, Exhibit F). *See* 29 C.F.R. § § 1601.13 (respondent to be served by EEOC with copy of charge within 10 days of filing) and 1601.12(b)(1) (iv) (60-day period of deferral commences upon EEOC mailing to "706 agency") (1977). It should be noted that the EEOC does not appear to have requested plaintiff to provide it with a formal and verified Title VII charge as required by regulation, *see* 29 C.F.R. § § 1601.8, 1601.11 (1977), but rather apparently treated plaintiff's letter received by the EEOC on June 15, 1976, or possibly plaintiff's verified complaint filed with the New York State Division of Human Rights on August 12, 1976, as constituting plaintiff's charge before the EEOC. *See generally Georgia Power Co. v. EEOC*, 412 F.2d 462, 466 (5th Cir. 1969).

Mohasco Corporation responded to the EEOC's notice by raising an objection to the assumption of jurisdiction by the EEOC. Defendant Mohasco Corporation argued that plaintiff failed to file a charge with the EEOC within any applicable limitations period prescribed by Title VII.

Thereafter, on February 9, 1977, the New York State Division of Human Rights issued its determination that "[i] t cannot be ascertained that complainant's employment was terminated for reasons other than management's

judgment that his job performance was unsatisfactory" and found that there was no probable cause to believe that Mohasco Corporation had engaged in the unlawful discriminatory practice complained of by the plaintiff. (Motion for Summary Judgment, Exhibit H, filed February 14, 1978). This determination was upheld by the New York State Human Rights Appeal Board on December 22, 1977. (*Id.*, Exhibit I).

The EEOC issued its determination and provided plaintiff with a notice of right to sue on August 24, 1977. The determination by the EEOC states:

> Respondent [Mohasco Corporation] is an employer within the meaning of Title VII and the timeliness, deferral and all other jurisdictional requirements have been met. . . .[However,] there is not reasonable cause to believe the charge is true.

(Motion for Summary Judgment, Exhibit J, filed February 14, 1978). Plaintiff commenced the present lawsuit on November 23, 1977, 91 days after transmittal of this determination and notice of right to sue by the EEOC.

In providing for "complaint" suits under Title VII, Congress evinced a preference for administrative conciliation over litigation. *See, e.g., Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). Consequently, the EEOC can bring a civil "complaint" action against a private sector employer only after the "informal methods of conference, conciliation, and persuasion" have failed. 42 U.S.C. § 2000e-5 (b). *See also* 42 U.S.C. § 2000e-5(f)(1). Likewise, before a private "complaint" action can be brought to vindicate an alleged violation of Title VII rights, the EEOC, and in many cases a "706 agency" as well, must have had an opportunity to investigate and rule on the merits of the charging party's claim. Aside from complying with the appropriate deferral period mandated by Title VII, if applicable, a person claiming to be aggrieved cannot commence a private "complaint" action against a private sector employer until the EEOC has dismissed the charge *or* if within the passage of 180 days from the filing of the charge or within the 60-day deferral period, whichever is later, the EEOC has not entered into a conciliation agreement or filed a civil action with regard to the charge, after which time the EEOC is

required to notify the charging party that a private civil action may now be commenced. 42 U.S.C. § 2000e-5 (f) (1).

In addition to following the above-mentioned procedures, a private litigant must also abide by the statutory time requirements prescribed by Title VII for the filing of an unlawful employment practice charge with the EEOC. Pursuant to Title VII:

> A charge . . . shall be filed within one hundred and eighty [180] days after the alleged unlawful employment practice occurred . . . except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a [706 agency] . . . such charge shall be filed by or on behalf of the person aggrieved within three hundred [300] days after the alleged unlawful employment practice occurred, or within thirty [30] days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier. . . .

42 U.S.C. § 2000e-5(e). In Title VII, however, Congress also provided that:

> In the case of an alleged unlawful employment practice occuring in a State, or political subdivision of a State, [having a 706 agency] . . . *no charge may be filed*. . .by the person aggrieved before the expiration of sixty [60] days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated. . . .

42 U.S.C. § 2000e-5(c) (emphasis added).

It is undisputed that on June 15, 1976, the day on which the EEOC received plaintiff's letter alleging a charge of employment discrimination, plaintiff had not commenced a proceeding before the New York State Division of Human Rights. Therefore, under § 2000e-5(c), which is applicable under the circumstances of this case along with § 2000e-5(e)'s extended time period for filing, it

would appear to be clear that plaintiff's charge could not have been immediately filed but must have been in "suspended animation" status until 60 days after a proceeding was commenced before the Division of Human Rights, *but see* 29 C.F.R. § 1601.12(b)(1)(iv) (60-day deferral period commences upon EEOC mailing to "706 agency") (1977), at which time plaintiff's charge would have been automatically filed by the EEOC. *See Love v. Pullman Co., supra,* 404 U.S. at 526. Although the EEOC appears to have treated its deferral to the Division of Human Rights as *commencing* proceedings before that "706 agency" in accordance with § 2000e-5(c), *see* Motion for Summary Judgment, Exhibit F, filed February 14, 1978; 29 C.F.R. § 1601.13 (respondent to be served by EEOC with copy of charge within 10 days of filing) (1977), in my judgment, plaintiff's proceeding before the New York State Division of Human Rights was not commenced until August 12, 1976, when plaintiff filed a verified complaint with that agency. *Compare* 42 U.S.C. § 2000e-5(c) *and Love v. Pullman Co., supra,* 404 U.S. at 525 & n.4, *with* N.Y. Executive Law § 297(1) (Human Rights Law) (McKinney 1972). *See* Motion for Summary Judgment, at 12-16 & Exhibits C, D & E, filed February 14, 1978.

Assuming *arguendo,* however, that plaintiff's proceeding under state law was commenced upon the EEOC's referral to the New York State Division of Human Rights by letter of June 15, 1976, the 60-day deferral period would have run on August 14, 1976, 52 days after the applicable time period for filing a charge based on plaintiff's discharge on August 29, 1975, had expired. 42 U.S.C. §§ 2000e-5(c), 2000e-5(e). Therefore, the EEOC could not have filed plaintiff's charge of discrimination until after the statutory time period for the filing of such a claim had passed.

At this point I feel I must point out what appear to me to be anomalous procedural modes of action within § 2000e-5(c) and § 2000e-5(e) of Title VII. As noted above, in view of the method that plaintiff utilized to bring his claim before the EEOC, plaintiff's charge could not have been deemed filed by the EEOC under § 2000e-5(c) until August 14, 1976, at the earliest unless the Division of Human Rights had terminated its proceedings in less than 60 days. If, however, plaintiff on June 15, 1976, went directly to the New York State Division of Human

Rights and instituted a proceeding before that agency and thereafter, within the next 8 days, notified the EEOC of his charge, then under § 2000e-5(e) his charge would have been deemed filed on June 23, 1976, the 300th day after his discharge, and would have been timely. This second procedural route, however, was not followed by the plaintiff in this lawsuit.

Despite this anomaly I perceive of no sound reasons for recognizing a toll of Title VII's time requirements in this case. *See Electrical Workers Local 790 v. Robbins & Myers, Inc.,* 429 U.S. 229 (1976); *Keyse v. California Texas Oil Corp.,* 442 F. Supp. 1257, 1259 (S.D.N.Y. 1978). Although the time requirement for the filing of a charge with the EEOC functions as a statute of limitations, *see Occidental Life Insurance Co. v. EEOC,* 432 U.S. 355, 371-72 (1977); *but see Electrical Workers Local 790 v. Robbins & Myers, Inc., supra,* 429 U.S. at 240; *Alexander v. Gardner-Denver Co., supra,* 415 U.S. at 47, and procedural requirements in a private "complaint" action should be viewed with liberality, *e.g., Smith v. American President Lines, Ltd., supra,* 571 F.2d at 105, a toll under the circumstances of this case would only work to circumvent the dictates of Title VII itself.

Plaintiff was in no way hindered from pressing his charge of employment discrimination in any appropriate forum, *see, e.g. Alexander v. Gardner-Denver Co., supra,* 415 U.S. at 47-49, and the record before the EEOC reveals that plaintiff, who attended a law school for a period of two years, was represented by counsel at some point during proceedings before the EEOC and therefore, at least up until that time, obviously had opportunities to acquire knowledge of his rights and responsibilities under Title VII, *see, e.g., Smith v. American President Lines, Ltd., supra,* 571 F.2d at 109-10.

In my judgment, plaintiff has not demonstrated that the circumstances of this case would justify a toll. *Compare Electrical Workers Local 790 v. Robbins & Myers, Inc., supra,* 429 U.S. at 236-40 *and Smith v. American President Lines, Ltd., supra,* 571 F.2d at 108-11, *with Dartt v. Shell Oil Co.,* 539 F.2d 1256 (10th Cir. 1976), *aff'd by an equally divided court,* 434 U.S. 99 (1977) *and Reeb v. Economic Opportunity Atlanta, Inc.,* 516 F.2d 924 (5th Cir. 1975). Furthermore, in my opinion, it would not be

appropriate to toll this time requirement in favor of a plaintiff who waited 292 days from the date of the alleged violation to notify the EEOC. *See generally Olson v. Rembrandt Printing Co.,* 511 F.2d 1228, 1231-33 & n.11 (8th Cir. 1975) (en banc).

Section 2000e-5(e) establishes a 180-day period of limitations on the filing of a charge with the EEOC if such charge arose in a state or political subdivision that does not have a "706 agency." This period of limitations is extended to 300 days if the alleged violation occurred in a state or political subdivision that has a "706 agency." The additional 120 days are intended to compensate for the deferral periods of Title VII and to allow a charging party additional time to pursue state-created remedies. *See Moore v. Sunbeam Corp.,* 459 F.2d 811, 825 n.35 (7th Cir. 1972) (Stevens, J.). Under § 2000e-5(e), as previously noted, a charging party could commence a proceeding before a "706 agency" 299 days after the alleged violation occurred and file a charge with the EEOC on the very next day. Nonetheless, under this same section, a charging party who, let us say 100 days after the alleged violation occurred, commences a proceeding before a "706 agency" and who is notified within 170 days that his proceeding has been terminated by that "706 agency" will be required to file his charge with the EEOC before the expiration of 300 days from the date the alleged violation occurred.

Similarly, under § 2000e-5(c), when a charging party notifies the EEOC of an alleged violation that occurred in a state or political subdivision that has a "706 agency" prior to the commencement of a proceeding under state or local law, the EEOC may not file that charge before the expiration of 60 days after such a proceeding is commenced unless it is earlier terminated. Therefore, a charging party who has not first instituted a proceeding before a "706 agency" under circumstances as described above, must, unless the state or local proceeding is swiftly terminated, notify the EEOC of the alleged violation at least 240 days after the date of the alleged violation if he wishes his charge to be timely.

Although at first glance these time periods may appear unjust it must be remembered that such limitations are legislative enactments not reviewable in this Court. Furthermore, it is readily observable, that, in general, the periods

of limitation will be longer than 180 days for those individuals, like plaintiff, who have alleged a violation occurring in a state or political subdivision that has a "706 agency." Yet,

> [t]here is no suggestion [in the legislative history of Title VII] that complainants in some states were to be allowed to proceed with less diligence than those in other states.

Moore v. Sunbeam Corp., supra, 459 F.2d at 825 n.35. Thus, to recognize a toll in favor of a plaintiff who waited 292 days after the alleged violation occurred to notify the EEOC would not, in my judgment, be in keeping with the congressional purpose of ensuring "expedition in the filing and handling" of such cases. *Love v. Pullman Co., supra,* 404 U.S. at 526.

It has been held that the time period within which to file a charge under Title VII does not begin to run until the facts that would support such a charge are or should be apparent to a reasonably prudent individual. *See Reeb v. Economic Opportunity Atlanta, Inc., supra,* 516 F.2d at 931. It should be emphasized, however, that plaintiff, in his letter to the EEOC, stated that he "was suspicious. . . right at the start" of his employment with defendant Mohasco Corporation that he might be the victim of discrimination. Also, plaintiff's complaint alleges that he was the target of harassment and mental abuse from the first day of his employment with defendant Mohasco Corporation. (Complaint, ¶ 37). Furthermore, plaintiff's complaint demonstrates that plaintiff was or should have been aware of the essential elements of his claim of employment discrimination well within the time requirements for filing of a charge, *i.e.,* some eight months prior to his sending a letter to the EEOC encompassing a charge of violation of Title VII. (See Complaint, ¶¶ 59, 60).

In addition, plaintiff's assertion in his complaint filed on November 23, 1978, of a continuous pattern of identifiable discriminatory conduct, which was not alleged in his charge filed with the EEOC, does not, in my judgment, work to save plaintiff's untimely charge of discriminatory discharge. *See, e.g., Smith v. American President Lines, Ltd., supra,* 571 F.2d at 105-106; *Laffey v. Northwest Airlines, Inc.,* 567 F.2d 429, 473-74 (D.C. Cir. 1976),

cert. denied, 434 U.S. 1086 (1978); *Carter v. Delta Air Lines, Inc.,* 441 F. Supp. 808, 811-12 (S.D.N.Y. 1977). This ruling is further supported by Part III of this memorandum-decision and order.

Plaintiff, however, requests this Court to rely on an EEOC regulation and hold that his charge was timely filed. Plaintiff cites 29 C.F.R. § 1601.12(b)(1)(v)(A) (1977) which states:

> In cases where the document is submitted to the Commission more than 180 days from the date of the alleged violation but within the period of limitation of the particular 706 Agency, the case shall be deferred pursuant to the procedures set forth above: *Provided, however,* That unless the Commission is earlier notified of the termination of the State or local proceedings, the Commission will consider the charge to be filed with the Commission on the 300th day following the alleged discrimination and will commence processing the case. Where the State or local agency terminates its proceedings prior to the 300th day following the alleged act of discrimination, without notification to the Commission of such termination, the Commission will consider the charge to be filed with the Commission on the date the person making the charge was notified of the termination.

But see 29 C.F.R. § 1601.12(b)(1)(iii) (1977).

The period of limitation for filing a complaint with the New York State Division of Human Rights is one year. N.Y. Executive Law § 297(5) (McKinney Supp. 1977). Therefore, if August 29, 1975, is taken as the date on which the plaintiff's claim arose, then both the deferral by the EEOC to the Division of Human Rights by letter dated June 15, 1976, and the filing of plaintiff's verified complaint with the Division of Human Rights on August 12, 1976, were timely. Furthermore, if 29 C.F.R. § 1601.12 (b)(1)(v)(A) (1977) is accepted as controlling, then plaintiff's charge must be deemed filed with the EEOC on June 23, 1976, the 300th day following the alleged violation of his Title VII rights. Following this line of reasoning, plaintiff's judicial complaint, which was filed on November 23, 1977, or

91 days after the EEOC's transmittal of a notice of right to sue to the plaintiff, would have been timely. *See generally Kirk v. Rockwell International Corp.,* 578 F.2d 814, 819 (9th Cir. 1978); *Tavernaris v. Beaver Area School District,* 454 F. Supp. 355 (W.D. Pa. 1978).

In my judgment, this regulation cannot be used to save plaintiff's private "complaint" suit. Initially, it should be noted that the EEOC did not mail defendant Mohasco Corporation notice of plaintiff's charge within 10 days of June 23, 1976, nor does it appear that the EEOC began processing plaintiff's charge on June 23, 1976. In fact, the EEOC's notice of deferral to the New York State Division of Human Rights indicated that plaintiff's charge would be filed *at the expiration of the deferral period* unless the EEOC was notified of an earlier termination of proceedings by the Division of Human Rights. (Motion for Summary Judgment, Exhibit B, filed February 14, 1978). Therefore, the record before the EEOC is consistent only with the view that the EEOC deemed plaintiff's charge to have been filed at the expiration of the 60-day deferral period.

Although the EEOC accepted plaintiff's charge as timely, there is nothing in the record to show the basis for such a determination. Furthermore, it does not appear that plaintiff relied on 29 C.F.R. § 1601.12(b)(1)(v)(A) when he notified the EEOC of his charge of discrimination. One thing is clear, however, and that is that this Court is not bound to accept the EEOC's determination in this respect as binding. *E.g., Weise v. Syracuse University, supra,* 522 F.2d at 413; *Carter v. Delta Air Lines, Inc., supra,* 441 F. Supp. at 812.

Moreover, in my opinion, 29 C.F.R. § 1601.12(b)(1)(v)(A) (1977) appears to be contrary to the plain language of 42 U.S.C. § 2000e-5(c) which states that under circumstances as presented herein "no charge may be filed" by the EEOC before expiration of 60 days after proceedings have been commenced before a "706 agency" unless such proceedings have been earlier terminated.

It is interesting to note that this precise language of § 2000e-5(c) was the subject of discussion during congressional debate concerning the 1972 amendments that became the Equal Employment Opportunity Act of 1972. A pronouncement of the managers at the conference on the

bill to amend Title VII states:

> The Senate amendment contained two provisions allowing the Commission to defer to state and local equal employment opportunity agencies. It deleted the language of existing law providing that no charge may be filed during the 60-day period allowed for the deferral and substituted a provision prohibiting the Commission from acting on such a charge until the expiration of the 60-day period. The House bill made no change in existing law. The Senate receded with an amendment that would restate the existing law on the deferral of charges to state agencies. The conferees left existing law intact with the understanding that the decision in *Love v. Pullman,* [404 U.S. 522] (1972) interpreting the existing law to allow the Commission to receive a charge (but not act on it) during such deferral period is controlling.

Joint Explanatory Statement of Managers at the Conference on H.R. 1746 to Further Promote Equal Employment Opportunities for America Workers, *reprinted in* U.S. Cong. & Ad. News 2179, 2181 (1972).

It is not at all clear to me what the congressional purpose was behind this passage. In my opinion, the managers' reference to *Love* can only be viewed as directed toward a problem not encountered in this case. In *Love v. Pullman Co., supra,* all the Supreme Court held was that a charging party's failure to first file with an existing "706 agency" is not fatal to the subsequent prosecution of a charge of discrimination and that the statutory requirement of deferral to a "706 agency" necessarily created an exception to an EEOC regulation, 29 C.F.R. § 1601.11(b) (1977), which provided that a charge is deemed filed upon receipt by the EEOC. The Court merely approved of the practice of the EEOC whereby it would hold a charge of discrimination in "suspended animation" during the deferral period and then formally or automatically file it upon termination of the state or local proceedings. It is important to note that in *Love* the state proceeding was terminated and plaintiff's charge of discrimination was deemed filed by the EEOC at a time when the statutory time period had not yet passed. The plaintiff in *Love*

had alleged a continuing violation of Title VII and therefore the issue before the Supreme Court concerned only whether a second "filing" *within the statutory time requirement* was mandated by Title VII. I should further note that I find inapplicable the Supreme Court's equating of "holding a charge in suspended animation" and "holding a charge in abeyance" in the context of the issue before this Court. *Love v. Pullman Co., supra,* 404 U.S. at 526-27 n.6. *Compare* 42 U.S.C. § 2000e-5(c) ("*no charge may be filed*. . . by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law. . . .") (emphasis added) *with* 42 U.S.C. § 2000e-5(d) ("[i]n the case of any *charge filed* by a member of the Commission. . .the Commission shall, before taking any action with respect to such charge, notify the appropriate [706 agency] . . . and, upon request, afford them a reasonable time, but not less than sixty days . . .to act. . . . ") (emphasis added). In my judgment, there is a substantial difference between "holding a charge in suspended animation prior to filing" and "holding a charge in abeyance prior to processing" when what is at issue and is to be measured is the time period within which to file a charge.

Although there is authority, based on an analysis of *Love,* for the proposition that initial receipt by the EEOC of a Title VII charge prior to initiation of a proceeding before an existing "706 agency" tolls the time requirements for the filing of a charge with the EEOC, *see Richard v. McDonnell Douglas Corp.,* 469 F.2d 1249 (8th Cir. 1972); *Anderson v. Methodist Evangelical Hospital, Inc.,* 464 F.2d 723 (6th Cir. 1972); *Vigil v. American Telephone & Telegraph Co.,* 455 F.2d 1222 (10th Cir. 1972), it is not binding on this Court and I do not find its reasoning persuasive. Rather, I concur in the analysis and reasoning of Justice Stevens (then Circuit Judge) in *Moore v. Sunbeam Corp., supra,* 459 F.2d at 822-26, in which the Court of Appeals, Seventh Circuit, held that the filing date for purposes of Title VII's time requirements is the date of expiration of the 60-day deferral period unless the "706 agency" earlier terminates its proceedings. *See also Doski v. M. Goldseker Co.,* 539 F.2d 1326 (4th Cir. 1976); *Olson v. Rembrandt Printing Co., supra,* 511 F.2d 1228 (8th Cir. 1975) (en banc). In addition, I believe that this reasoning is further supported by the Supreme Court's decision in *Electrical Workers Local 790 v. Robbins & Myers, Inc., supra,* 429 U.S. at 236-40, wherein the Court refused to

extend this limitations period beyond the limits already established by Congress.

Therefore, while recognizing that the law in this area seems unsettled and confused, it is my judgment that to the extent 29 C.F.R. § 1601.12(b)(1)(v)(A) (1977) seems contrary to the plain, although still complicated, language of § 2000e-5(c) and § 2000e-5(e) of Title VII, I find this regulation to be unauthorized by the statute. If this regulation is viewed as a legislative rule, in my opinion, it should be considered invalid because it was not promulgated pursuant to a statutory grant of power to make law, *see* 29 C.F.R. § 1601.12(a) (1977), authorizing the EEOC to extend the time requirements of Title VII. *See generally* 42 U.S.C. § 2000e-12(a); *General Electric Co. v. Gilbert,* 429 U.S. 125, 140-45 (1976); *National Nutritional Foods Association v. Weinberger,* 512 F.2d 688, 696 (2d Cir.), *cert. denied,* 423 U.S. 827 (1975). In addition, if it is to be viewed as an interpretative rule, this regulation is not entitled to "great deference" with regard to the issue before this Court, *see Pacific Gas & Electric Co. v. Federal Power Commission,* 506 F.2d 33, 37 n.14 (D.C. Cir. 1974), and because, in my judgment, it is in conflict with Title VII itself, I find that this regulation does not have the force of law and is ineffective in this situation. *See Electrical Workers Local 790 v. Robbins & Myers, Inc., supra,* 429 U.S. at 240; *Morton v. Ruiz,* 415 U.S. 199, 237 (1974); *Moore v. Sunbeam Corp., supra,* 459 F.2d at 824. Moreover, it does not appear in the record that the EEOC ever relied on this regulation with respect to plaintiff's charge.

It is clear that Congress, in enacting Title VII, was concerned with the expeditious filing and disposition of such cases. *E.g.,* 42 U.S.C. § 2000e-5(f)(5). Yet, when the EEOC was given enforcement powers under the Equal Employment Opportunity Act of 1972 another important change was enlargement of the time requirements for the filing of a charge and commencement of a judicial action by a person claiming to be aggrieved. Pub. L. 92-261, § 4, March 24, 1972, 86 Stat. 104-105.

If the EEOC, in fact, followed the procedures advocated by the plaintiff, the EEOC would have deemed plaintiff's charge filed on the 300th day following termination of his employment, *i.e.,* June 23, 1976, thereby administratively reducing the 60-day deferral period mandated

by § 2000e-5(c) to a total of only 8 days. This would have been 49 days before plaintiff actually filed his verified complaint with the New York State Division of Human Rights -- such filing being clearly in conflict with the deferral policy of Title VII. This, in my judgment, the EEOC is not empowered to do. It is for Congress in its wisdom to further extend these present time requirements legislatively and not for administrative or judicial tribunals to so rule. *See Electrical Workers Local 790 v. Robbins & Myers, Inc., supra,* 429 U.S. at 240; *DeMatteis v. Eastman Kodak Co.,* 511 F.2d 306, 311 (2d Cir.), *modified on rehearing,* 520 F.2d 409 (2d Cir. 1975); *Keyse v. California Texas Oil Corp., supra,* 442 F. Supp. at 1259.

III

The defendants have raised several additional issues, one of which I believe should be addressed. Defendants contend that because plaintiff's charge filed with the New York State Division of Human Rights and the EEOC did not allege a continuing violation of Title VII, the allegations in plaintiff's judicial complaint concerning acts of continuing and post-employment discrimination should be dismissed.

The gravamen of plaintiff's letter received by the EEOC on June 15, 1976, is very specific in nature, stating that plaintiff was both hired and fired because of his religion, and in my judgment does not set forth a claim of a continuous violation. Additionally, plaintiff's verified complaint filed with the New York State Division of Human Rights is unquestionably limited to a claim of discriminatory discharge. Therefore, it is clear to me that the scope of the ensuing EEOC investigation was necessarily limited to the period of plaintiff's employment with defendant Mohasco Corporation. *See Hubbard v. Rubbermaid, Inc.,* 436 F. Supp. 1184, 1190-93 (D. Md. 1977).

In my judgment, plaintiff's EEOC charge can be construed to allege only an isolated set of discriminatory circumstances directed at his own employment with defendant Mohasco Corporation and not a continuing wrong. Furthermore, plaintiff's allegations of continuing violations and post-employment discrimination in this civil action are, in my judgment, not similar or reasonably related to the acts or omissions alleged in his charge filed with the EEOC and are not such as one might reasonably expect to grow out of

that charge. *See, e.g., Ortega v. Construction & General Laborers' Union,* 396 F. Supp. 976, 980 (D. Conn. 1975).

This does not mean, however, that, under any set of circumstances, plaintiff's claim of post-employment discrimination in connection with statements made to prospective employers would not have been cognizable in this Court under Title VII if the proper preliminary administrative procedures had been followed. *See* 42 U.S.C. § 2000e-3; *Pantchenko v. C. B. Dolge Co.,* ___ F.2d ___, Slip Op. 4461 (2d Cir. August 15, 1978); *Dubnick v. Firestone Tire & Rubber Co.,* 355 F. Supp. 138, 140-41 (E.D.N.Y. 1973).

Title VII's statutory scheme mandates that a person alleged to be aggrieved not bypass the administrative machinery of the EEOC by seeking initial enforcement of Title VII rights in the courts. If a charging party does not utilize the administrative remedies made available by Congress, then such remedies might just as well not exist and alleged violations would be first tested in courts of law rather than through preliminary deferment to a specialized agency and informal methods of conciliation.

Thus, in my judgment, no circumstances have been shown that would warrant a finding of continuing and post-employment discrimination growing out of plaintiff's charge filed with the EEOC. *See, e.g., Ferguson v. Mobil Oil Corp.,* 443 F. Supp. 1334, 1337-40 (S.D.N.Y. 1978). Therefore, all allegations in plaintiff's judicial complaint not contained in his EEOC charge should be dismissed. *See, e.g., United Air Lines, Inc. v. Evans,* 431 U.S. 553 (1977); *Smith v. American President Lines, Ltd., supra,* 571 F.2d 106-107 n.7; *Ostapowicz v. Johnson Bronze Co.,* 541 F.2d 394, 398-99 (10th Cir. 1976), *cert. denied,* 429 U.S. 1041 (1977); *East v. Romine, Inc.,* 518 F.2d 332, 336-37 (5th Cir. 1975); *Aungst v. J. C. Penny Co.,* Civil No. 77-1287 (W.D. Pa. August 23, 1978); *Edwards v. North American Rockwell Corp.,* 291 F. Supp. 199, 203-205 (C.D. Cal. 1968).

IV

Cases such as this are not easy ones and the review that was necessary of the voluminous submissions, statutes, and regulations most difficult. Nonetheless, courts are increasingly being called upon to decide delicate issues in this developing field of law. Thus, in situations such as this it

can readily be seen that it is desirable for litigants to utilize effective and feasible administrative remedies, in accordance with proper procedural requirements, prior to entering the courthouse. Individuals claiming discrimination in employment in violation of these new laws are entitled to have their charges expeditiously and conclusively determined. Yet, at the same time it is important to remember that those on the defense side who have been alleged to have violated the mandates of our equal employment opportunity laws, a most serious charge, also have rights that should not be overlooked or minimized.

Accordingly, the motion to dismiss made by defendants Curren, Greenhill, Woller, Brown, and Cullen is hereby granted on the ground of lack of jurisdiction over the subject matter because plaintiff failed to file a Title VII charge with the EEOC naming these individuals as respondents. Defendant Mohasco Corporation's motion for summary judgment is granted and judgment shall enter in its favor dismissing the complaint against it as a matter of law on the ground of lack of jurisdiction over the subject matter because of the lack of a timely filing with the EEOC. Therefore, the complaint is dismissed in its entirety.

It is so Ordered.

Dated: October 17, 1978
Albany, New York

s/ JAMES T. FOLEY
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
For the SECOND CIRCUIT

No. 1112 – August Term, 1978.

(Argued June 7, 1979 Decided July 18, 1979.)

Docket No. 78-7595

RALPH H. SILVER,

Plaintiff-Appellant,

–v.–

MOHASCO CORPORATION, EDWARD CURREN, RAYMOND GREENHILL, FREDERICK WOLLER, HERBERT BROWN and JAMES CULLEN,

Defendants-Appellees.

Before:

KAUFMAN, *Chief Judge,*
OAKES and MESKILL, *Circuit Judges.*

KAUFMAN, *Chief Judge:*

In this case, in which we are called upon to interpret Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e, Learned Hand's admonition is particularly appropriate:

> There is no surer guide in the interpretation of a statute than its purpose when that is sufficiently disclosed; nor any surer mark of over solicitude for the letter than to wince at carrying out that purpose because the words used do not formally quite match with it.[1]

We believe that the district court failed to attach sufficient weight to the overriding purpose of the Act.

I

Title VII is a statute "rife with procedural requirements which are sufficiently labyrinthine to baffle the most experienced lawyer," *Egelston v. State University College at Geneseo,* 535 F.2d 752, 754 (2d Cir. 1976), not to mention a layman such as the appellant Ralph H. Silver. On August 29, 1975, Silver was discharged from his position as a senior marketing economist with appellee Mohasco Corporation. During his thirteen-month tenure, Silver, who is of the Jewish faith, came to believe he was the target of harassment by Mohasco executives because of his religious beliefs.[2] Silver alleged Mohasco wished to induce him to resign, and that he was discharged when he refused to do so.

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1 *Federal Deposit Insurance Corp. v. Tremaine,* 133 F.2d 827, 830 (2d Cir. 1943).

2 We, of course, express no view on the merits of Silver's substantive allegations of discrimination.

Sometime after his discharge, Silver concluded that Mohasco's treatment of him was part of a carefully conceived plan under which Jews and other minorities were hired, harassed, and fired in a systematic fashion. This scheme, Silver believed, was designed to erect a facade of equal employment opportunity at Mohasco.

Thus, on June 15, 1976, some 291 days after his discharge, Silver wrote to the Buffalo office of the Equal Employment Opportunity Commission (EEOC). In his letter, Silver alleged that he had been hired and subsequently discharged because of his religion, and detailed the substance of his charge against Mohasco. Silver concluded by characterizing it as a "rough, incomplete and hastily drafted complaint."

Upon receiving Silver's communication, the EEOC set into motion the complex procedural machine established by Title VII. The Commission immediately forwarded the letter to the New York State Division of Human Rights (NYSDHR). Under § 706(c) of the statute, that agency must be given sixty days to process a charge before the EEOC may act.[3] Accordingly, the EEOC advised NYSDHR

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3 *See* Title VII of the Civil Rights Act of 1964, § 706(c), 42 U.S.C. § 2000e-5(c) [hereinafter cited as § 706(c)]:

> In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purpose of this sub-

that it would automatically file the charge at the expiration of the deferral period. The EEOC formally processed Silver's charge on August 20, 1976.[4]

On August 12, Silver complied with an NYSDHR request that he file a formal complaint.[5] Nineteen days later, Silver wrote to both NYSDHR and the EEOC, detailing his suspicions that Mohasco had been "blacklisting" him by supplying unfavorable references to prospective employers. On February 9, 1977, NYSDHR, without discussing the allegations of blacklisting, announced its conclusion that there was not probable cause to believe Silver had been discharged because of his religion.

At this point the proceedings shifted back to the EEOC. That agency, which had deferred any investigation of Silver's claim until NYSDHR issued its findings, adopted them as its own on August 24, 1977. Finally, in compliance with another procedural mandate of Title VII, the EEOC issued a "right to sue" letter to Silver, enabling him to pursue his charges in federal district court.[6] This he did promptly by filing his complaint on November 23, 1977. Mohasco responded by moving for summary judgment, which Judge Foley granted.[7]

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section at the time such statement is sent by registered mail to the appropriate State or local authority.

NYSDHR is the state agency established under N. Y. Exec. Law §293 (McKinney 1972) to consider employment discrimination claims.

4 The EEOC calculated the sixty-day deferral period as beginning on June 15, 1976, the day on which the Commission referred Silver's letter to NYSDHR. Under this view, the deferral period ended on August 14, 1976.

5 The district court concluded that Silver's charge was first "filed" with the state agency on this date. *See Silver v. Mohasco Corp.*, No. 77-CV-472, slip op. at 11 (N.D.N.Y. Oct. 17, 1978). We address this contention in note 10 *infra.*

6 *See* Title VII of the Civil Rights Act of 1964, §706(f)(1), 42 U.S.C. §2000e-5(f)(1).

7 Silver's complaint named as defendants the Mohasco Corporation and several individual Mohasco executives. In its answer, filed December 29, 1977, the corporation acknowledged Silver's

Silver, the judge held, had failed to file his charge with the EEOC within 300 days of his discharge, as required by § 706(e) of Title VII.[8] Moreover, Judge Foley concluded that he could not consider Silver's allegations of blacklisting because they had not been investigated by either the EEOC or NYSDHR. We are of the view that both rulings were erroneous.

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letter to the EEOC of June 15, 1976, but asserted, as an affirmative defense, that the letter was not "filed" as a matter of law on that date. On January 27, 1978, the individual defendants moved to dismiss under Fed.R.Civ.P. 12(b)(6) on the ground they did not receive proper notice of any EEOC investigation. Shortly thereafter, on February 14, the corporate defendant moved for summary judgment under Fed.R.Civ.P. 56, alleging that Silver's claim was time-barred under Title VII.

The district judge granted both motions in a single opinion filed on October 17, 1978. As to the individual defendants, we agree with Judge Foley that, because they were not notified of any EEOC investigation of their individual conduct, these defendants could not be included in Silver's complaint. *See Travers v. Corning Glass Works,* 76 F.R.D. 431 (S.D.N.Y. 1977) (Weinfeld, J.).

8 A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

42 U.S.C. § 2000e-5(e) [hereinafter cited as § 706(e)].

II

The resolution of this appeal hinges on determination of the date when a charge is considered "filed" with the EEOC. This superficially simple issue is complicated by the plethora of overlapping procedural requirements that pervade Title VII. Nonetheless, we believe that much of this complexity is overcome by fidelity to the fundamental policies embodied in Title VII. Indeed, our approach accords with the relevant case law, the legislative history, and the considered judgment of the EEOC.

A.

The crucial importance of "filing" under Title VII stems from the mandate of § 706(e) that, when a state has created an agency to hear employment discrimination claims, a charge must be "filed" with the EEOC within 300 days of the alleged discrimination.[9] *See International Union of Electrical, Radio & Machine Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 240 (1976). Unfortunately, this requirement becomes less than clear when considered together with § 706(c), which states that "no charge may be filed" with the EEOC, until sixty days after state agency proceedings have commenced.

Confronted with these two provisions, the able district court judge read § 706(c) literally. He reasoned that even when a charge is received by the EEOC well within 300 days of the alleged discrimination, it cannot be considered "filed" with that office until sixty days after referral to the state agency. Thus, according to Judge Foley, Silver's charge, albeit received by the EEOC 291 days after his discharge, was not "filed" before August 14, 1976, 352 days subsequent to the termination of his employment.[10]

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9 If, however, a state has not created such an agency, a charge must be filed with the EEOC within 180 days after the alleged violation. *Id.*

10 Because the district court concluded that the state agency proceeding did not commence until August 12, *see* note 5 *supra*, it determined that the sixty-day deferral period could not end before October 12. *Silver v. Mohasco Corp.*, No. 77-CV-472, slip op. at 11 (N.D.N.Y. Oct. 17, 1978). We believe, however, that the state proceedings "commenced" under § 706(c) on June 15, 1976, when Silver's letter was forwarded to NYSDHR by the EEOC. That a state law may require a formal filing becomes irrelevant to a determination of when the state proceeding "commences" for purposes of the federal statute. This conclusion is compelled by the Supreme Court's recent decision in *Oscar Mayer & Co. v. Evans*, 47 U.S.L.W. 4569, 4572 (U.S. May 21, 1979), that a state proceeding can be "commenced" for purposes of § 14(b) of the Age Discrimination in Employment Act, 29 U.S.C. § 633(b), even after the state statute of limitations has run. Moreover, the Court concluded that this construction of § 14(b) is consistent with interpretation of the virtually identical language of § 706(c). *See* 47 U.S.L.W. at 4571.

Accordingly, Judge Foley determined that Silver was barred by the 300-day jurisdictional prerequisite of § 706(e).

The district court decision would, therefore, require a Title VII complainant to file his charge with the state agency within 240 days of discharge or forfeit the opportunity to bring his complaint before the EEOC. We are of the view, however, that an informed reading of Title VII, consistent with its purpose, requires us to conclude that a charge is "filed" for purposes of § 706(e) when received, and "filed" as required by § 706 (c) when the state deferral period ends.

B.

In interpreting the filing provisions of Title VII, our lodestar must be the statute's fundamental purpose. In view of the strong federal policy in ensuring that employment discrimination is redressed, this court has consistently eschewed rigid construction of Title VII's procedural mandates. *See Egelston, supra*, 535 F.2d at 753-55; *accord, Weise v. Syracuse University*, 522 F.2d 397, 412 (2d Cir. 1975); *Voutsis v. Union Carbide Corp.*, 452 F.2d 889, 892 (2d Cir. 1971), *cert. denied*, 406 U.S. 918 (1972). Accordingly, we have resisted any temptation to require technical precision of Title VII plaintiffs, who often proceed without counsel. *See Oscar Mayer & Co. v. Evans*, 47 U.S.L.W. 4569, 4571 (U.S. May 21, 1979) (stressing the remedial purposes of employment discrimination statutes).[11]

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11 The Supreme Court in *Oscar Mayer* cited our decision in *Voutsis, supra*, with approval. *See* 47 U.S.L.W. at 4571, 4572.

Thus, it is the Supreme Court's decision in *Love v. Pullman Co.*, 404 U.S. 522 (1972), that best illuminates the path we travel in arriving at our decision in this case. In *Love,* the Supreme Court liberally construed the filing provision of § 706(c) and decided that a charge submitted initially in error to the EEOC may be kept in "suspended animation" by the Commission and automatically referred to the appropriate state agency. 404 U.S. at 526. After the sixty-day deferral period ended, the Court concluded, the EEOC may begin its own investigation. *Id.* Thus, the Court spared the unwary litigant of the obligation of "filing" a second EEOC charge sixty days after the first one was sent to the state agency, the proper recipient.

In our view, the clear import of *Love* is that a charge held, like Silver's, in "suspended animation," is "filed" under § 706(e) when the EEOC *first* receives it, and not when the sixty-day period ends.[12] As the *Love* Court

12 It has been argued that if "filing" in § 706(c) is not interpreted consistently with "filing" in § 706(e) a number of anomalies will arise. For example, we are told that if our construction of § 706(c) is adopted, a complainant in a state that has created an agency to process his charge has 300 days to file with the EEOC even if he does not file with the state first, although a complainant in a state without such an agency has only 180 days. See § 706(e); *Moore v. Sunbeam Corp.*, 459 F.2d 811, 825 n.35 (7th Cir. 1972).

Equally "anomalous procedural modes" however, arise under the district court judge's interpretation, as he himself recognized. *Silver v. Mohasco Corp.*, No. 77-CV-472, slip op. at 12 (N.D.N.Y. Oct. 17, 1978). Specifically, if NYSDHR had completed its investigation of Silver's charge within nine days, it would have been deemed "filed" with the EEOC on the 300th day and § 706(e) would have been satisfied. Because the state agency proceeding exceeded nine days, however, Silver was denied access to a federal forum. Thus, a complainant's fate would rest entirely with the state agency, a result specifically at odds with § 706(c)'s mandate that a state's procedural requirements "cannot foreclose federal relief." *Oscar Mayer & Co., supra,* 47 U.S.L.W. at 4573. Where, as here, both constructions lead to illogical treatment of similarly situated complainants, we prefer the interpretation that best vindicates the statutory purpose.

noted, to construe the statute to require a second "filing" after the state proceedings had concluded would create an additional procedural obstacle without advancing the purposes of the statute. 404 U.S. at 526-27.[13] We therefore hold that Silver's charge was "filed" under § 706(e) on June 15, 1976, 291 days after he was discharged and well within the 300-day limit.[14] In sum, we believe the requirement in § 706(c) that no charge be "filed" before the deferral period ends simply means that the EEOC may not process a Title VII complaint until sixty days after it has been referred to a state agency.

This interpretation not only serves the concern of Title VII for individual rights, but also comports with the overarching procedural scheme embodied in the statute. There is little doubt that § 706(c) is designed solely to provide state agencies with an opportunity, before the federal agency intervenes, to resolve disputes between employer and employee. *Oscar Mayer & Co., supra,* 47 U.S.L.W. at 4572; *accord, Love, supra,* 404 U.S. at 526; *Voustis, supra,* 452 F.2d at 892. Viewed in this light, it is clear that, because the charge is referred to the local agency after it is "filed" with the EEOC, appropriate respect is accorded the states. Moreover, in no sense can Title VII defendants be said to suffer prejudice or surprise under our reading of § 706(c), for the interpretation we have adopted does not countenance the filing of stale claims. *See Occidental Life*

13 Although there is language in *Love* that can be construed as suggesting that a charge is "filed" after the sixty-day period ends, *see, e.g.,* 404 U.S. at 526 & n.5; *Moore, supra,* 459 F.2d at 824, this reading is contradicted both by the passage cited in text and by the "clear import" of the Court's analysis, *Vigil v. American Telephone & Telegraph Co.,* 455 F.2d 1222, 1224 (10th Cir. 1972).

14 We find no merit in appellee's contention that if a charge is "filed" with the EEOC and then forwarded to a state agency, it is not "initially instituted" with the state as required by § 706(e). Appellee asserts that in such a situation the complainant has only 180 days to file with the EEOC. *Love* clearly recognizes that the EEOC may satisfy the deferral requirements of Title VII itself by simply notifying the state agency that a charge has been received. *See* 404 U.S. at 525-26.

Insurance Co. v. EEOC, 432 U.S. 355, 372 (1977); *accord, Love, supra,* 404 U.S. at 526. In the instant case appellee had ample notice of the proceedings before the state agency, EEOC, and the district court, which occurred in the sequence envisioned by Title VII. In such a case, we are compelled to reaffirm our conclusion in *Voutsis, supra,* 452 F.2d at 892 (footnote omitted):

> To place an unnecessary stumbling block in the private litigant's path, particularly when the national enforcement agency has carried out the federal mandate of accommodation to state action, would be hypertechnical and overly legalistic, and would improperly shield a discriminatory organization from the reach of civil litigation.

The views of three of the four circuits that have considered the precise question before us are substantially in accord with our own. *See Vigil v. American Telephone & Telegraph Co.,* 455 F.2d 1222 (10th Cir. 1972); *Anderson v. Methodist Evangelical Hospital, Inc.,* 464 F.2d 723 (6th Cir. 1972); *Richard v. McDonnell Douglas Corp.,* 469 F.2d 1249 (8th Cir. 1972).[15] Indeed, the *Vigil* court stated that the statutory construction we adopt today follows inexorably from the decision of the Supreme Court in *Love. See* 455 F.2d at 1224.

Only the Seventh Circuit has held otherwise. In *Moore v. Sunbeam Corp.,* 459 F.2d 811 (7th Cir. 1972), then-judge Stevens relied on a literal reading of the statute to prevent the EEOC from "filing" a charge until sixty days after its "receipt."[16] In our view, the statute's legislative history and

15 We do not reach the question, decided affirmatively by all three circuits, whether initial receipt of the charge by the EEOC "tolls" the § 706(e) statute of limitations. Rather, we interpret § 706(c) in a manner consistent with the result reached in *Vigil, Anderson,* and *Richard.* Moreover, we note that the Tenth Circuit employed our statutory construction as an alternative ground in *Vigil, supra,* 455 F.2d at 1224.

16 We note that the Supreme Court eschewed a literal reading of a nearly identical provision of the Age Discrimination in Employment Act, 29 U.S.C. § 633(b), in *Oscar Mayer, supra,* over a dissent by Justice Stevens, 47 U.S.L.W. at 4574.

clearly stated remedial function foreclose this result. We, therefore, disagree with the statutory construction adopted by the Seventh Circuit.[17]

C.

We note also that the legislative history of Title VII is not silent on the question before us. Indeed, before the statute was amended in 1972,[18] the Senate passed a bill designed to make explicit the construction we are adopting today. *See* S.2515, 92d Cong., 2d Sess., 118 Cong. Rec. 289, 290 (1972).[19] The House-Senate Conference Committee, however, retained the pre-1972 language because "[n]o change in these provisions was deemed necessary in view of the recent Supreme Court decision of *Love v. Pullman Co.,*" 118 Cong. Rec. 7564 (1972). Moreover, the Conference Committee explicitly endorsed the decision of the Tenth Circuit in *Vigil* and stated that "in order to protect the aggrieved person's right to file with the EEOC within the time periods specified . . . , a charge filed with a State or local agency may also be filed with the EEOC during the 60-day

17 The reliance of Judge Meskill and the Seventh Circuit on the "compromise which made it possible to pass the Civil Rights Act," 459 F.2d at 820-21, is rendered inappropriate by the clear legislative history of the 1972 Amendments to the statute. *See* Part II.C & note 19 *infra.* Because the events in *Moore* transpired before these Amendments took effect, the court refused to consider their impact. *See* 459 F.2d at 829-30. We are not so precluded.

18 *See* Pub.L. No. 92-261, 86 Stat. 103 (1972).

19 S. 2515 would have removed any reference to "filing" in §706(c) and would have stated instead that "the Commission shall take no action" before the expiration of the sixty-day deferral period. The Senate asserted that

> [t]he present statute is somewhat ambiguous respecting Commission action on charges filed prior to resort to the State or local agency. The new language *clarifies* the present statute by permitting the charge to be filed but prohibiting the Commission from taking action with respect thereto until the [deferral] period has elapsed.

S.Rep.No. 92-415, 92d Cong., 1st Sess. 36 (1971) (emphasis added).

deferral period." *Id.* It appears clear, therefore, that Congress accepted our interpretation of the statute as correct.

Finally, in cases arising under Title VII, we must accord "considerable deference" to the interpretations of the EEOC, the agency charged with administration of the statute. *Egelston, supra,* 535 F.2d at 755, n.4; *accord, Oscar Mayer & Co., supra,* 47 U.S.L.W. at 4572. The EEOC has consistently maintained that a charge is "filed" on the day it is received by the federal agency, without regard to the intervening deferral period. *See* 29 C.F.R. § 1601.12(b)(1)(v)(A) (1977).[20] In its current regulations, the EEOC clearly states that

> [t]he timeliness of a charge shall be measured for purposes of satisfying the filing requirements of section 706(e) of Title VII by the date on which the charge is received by the Commission. 29 C.F.R. § 1601.13(a).

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20 The regulation read as follows:

> In cases where the document is submitted to the Commission more than 180 days from the date of the alleged violation but within the period of limitation of the particular 706 Agency, the case shall be deferred pursuant to the procedures set forth above: *Provided, however,* That unless the Commission is earlier notified of the termination of the State or local proceedings, the Commission will consider the charge to be filed with the commission on the 300th day following the alleged discrimination and will commence processing the case. Where the State or local agency terminates its proceedings prior to the 300th day following the alleged act of discrimination, without notification to tne Commission of such termination, the Commission will consider the charge to be filed with the Commission on the date the person making the charge was notified of the termination.

The EEOC has consistently followed this administrative policy throughout the past ten years. It has filed a brief *amicus curiae* in this case, maintaining the same position.

III

We turn now to the second issue raised on this appeal - whether the district court can properly consider Silver's allegations of "blacklisting." Judge Foley determined that the scope of the EEOC's inquiry was of necessity limited to the period of Silver's employment, and that he therefore lacked power to adjudicate charges of post-employment blacklisting. We believe, however, that Title VII claimants should not be held to the precision of a code pleader.

Charges of post-employment blacklisting fall within the broad remedial scope of Title VII. *Pantchenko v. C.B. Dolge Co.,* 581 F.2d 1052, 1055 (2d Cir. 1978). And to furnish a remedy against discrimination in employment, no matter what specific form the invidious practice takes, we have embraced the same flexible approach in interpreting Title VII complaints that we have adopted in construing the statute's filing requirements. *See, e.g., Weise, supra,* 522 F.2d at 413;[21] *Noble v. University of Rochester,* 535 F.2d 756, 758 (2d Cir. 1976); *Egelston, supra,* 535 F.2d at 754-55.

We look not merely to the four corners of the often inarticulately framed charge, but take into account the "scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." *Smith v. American President Lines,* 571 F.2d 102, 107 n.10 (2d Cir. 1978); *accord, Tipler v. E.I. duPont deNemours & Co.,* 443 F.2d 125, 131 (6th Cir. 1971). Accordingly, we have previously construed Title VII charges to include allegations of "continuing discrimination" that occur "even after" the complaint is filed. *Noble, supra,* 535 F.2d at 758;

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21 We confronted a similar problem in *Weise* in which a Title VII complainant had been deprived of a judicial forum due to the Commission's miscomprehension of her complaint, and because the district court did not take her attempts at corrective measures into account. 522 F.2d at 413. Under such circumstances, Silver, like the complainant in *Weise,* deserves a judicial resolution of his charges.

accord, Oubichon v. North American Rockwell Corp., 482 F.2d 569, 571 (9th Cir. 1973); *Ortega v. Construction & General Laborers' Union,* 396 F. Supp. 976, 980 (D. Conn. 1975).[22]

Under the *American President Lines* standard, Silver's allegations of blacklisting cannot be said to have caught the EEOC by surprise. Silver alleged the existence of a comprehensive "plan" directed at Jewish executives. Indeed, the EEOC, although it did not investigate Silver's blacklisting charges, now concedes they were "reasonably related" to the original charge. *See* Brief for the Equal Employment Opportunity Commission as *Amicus Curiae,* at 15-17. Moreover, on August 31, 1976, almost a full year before the EEOC announced its findings and only eleven days after the agency commenced processing Silver's charge, he supplemented his "rough, incomplete and hastily drafted" complaint by notifying both the EEOC and the state agency of alleged blacklisting. Silver fairly presented the blacklisting charge to the Commission and he may now pursue his allegations in the district court.

Reversed and remanded.

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22 Because of our conclusion in Part II *supra,* we find it unnecessary to determine whether Silver's allegations of blacklisting constituted a claim of "continuing violations" for purposes of § 706(e). *See, e.g., Wetzel v. Liberty Mutual Insurance Co.,* 508 F.2d 239, 246 (3d Cir.), *cert. denied,* 421 U.S. 1011 (1975).

MESKILL, Circuit Judge, concurring in part and dissenting in part:

When the rights of litigants depend on the interpretation of legislation, whatever canon of statutory construction a party may fire at the opponent an equally authoritative but directly contrary shot will undoubtedly be fired in reply.[1] Caught as we are in the crossfire, it is understandable that judges sometimes wonder about the ratio of light to sound being generated by these attempts at persuasion. This, for me, is one of those times for wondering. If I were convinced, as the majority apparently is, that we must choose between interpreting the disputed statute (1) in accord with its language and contrary to its purpose, or (2) in accord with its purpose and contrary to its language, I too, following the learned canon that has been handed down to us, might have avoided over-solicitude for the letter of the statute and might have joined, without wincing, in carrying out its purpose. But we are not in such a predicament here. The majority has made a choice between two alternatives neither of which is presented by this case. Because both parties claim to have interpreted subsections 706(c) and 706(e) of Title VII in accordance with the purposes of Congress, our task is not to choose between effectuating or frustrating the purposes of Congress, but rather to determine which of the proferred interpretations in fact captures the purposes behind the words. Believing that in this case the purposes of Congress are furthered by a literal reading of these provisions, I respectfully dissent from part II of today's decision.[2]

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1 *See generally* K. Llewellyn, The Common Law Tradition: Deciding Appeals at 521-535 (1960).

2 I concur in the majority's affirmance of Judge Foley's order dismissing appellant's complaint as to the individual defendants. *See* majority's footnote 7, *supra.*

I also agree with part III of the majority opinion which states that the scope of the EEOC investigation which could reasonably have been expected to grow out of Silver's charge was sufficiently broad to encompass his allegation of blacklisting. EEOC regulations provide for the amendment of a charge to include additional unlawful practices "related to or growing out of the subject matter of the original charge." *See* 29 C.F.R. §1601.12(b) (1978); *see also* 29 C.F.R. § 1601.11(b) (1976). In August of 1976, two months after first contacting the EEOC, Silver sent to the district

Despite the much-emphasized complexity of Title VII, there is no dispute over the literal meaning of the two statutory provisions under examination. Section 706(c), the deferral provision, provides that in a state that has created an agency to hear employment discrimination claims (a "deferral state"), no charge may be filed with the EEOC until 60 days or 120 days (depending on how long the state agency has been in existence) after state proceedings have been commenced, unless such state proceedings have been earlier terminated. Section 706(e), the limitations provision, provides that charges must be filed with the EEOC within 180 days of the alleged unlawful employment practice, except that where an aggrieved party has initially instituted state proceedings, a charge must be filed with the EEOC within 300 days of the alleged unlawful practice.

The purposes behind these provisions are every bit as clear as their literal meanings. In *Love v. Pullman Co.*, 404 U.S. 522, 526 (1972), a unanimous Supreme Court explicitly stated that the purpose of Title VII's deferral provision is "to give state agencies a prior opportunity to consider discrimination complaints" while the purpose

director a letter clearly charging Mohasco with circulating bad references. I agree with the position taken by *amicus* EEOC on appeal; whether viewed as an amendment to the earlier charge or as a new charge, this letter was sufficient to notify the EEOC that an investigation of blacklisting was called for. The EEOC's failure to investigate this aspect of Silver's complaint should not foreclose his access to a court hearing. To earn the right to sue, a Title VII complainant need only seek, in an appropriate manner, administrative relief. Failure to obtain relief at the administrative level is what prompts, rather than forecloses, the search for judicial relief.

Therefore, I would remand the case to the district court for a hearing on the blacklisting claims, which appear from the record to have been promptly filed with the EEOC. In addition, I would instruct the district court to reconsider, in light of our disposition on the blacklisting issue, whether there has been any assertion of a continuous pattern of discrimination that would work to save Silver's charge of discriminatory discharge despite what I view as his failure to make a timely filing with the EEOC as to the discharge complaint. *See Smith v. American President Lines, Ltd.*, 571 F.2d 102, 105-106 & nn. 5-6 (2d Cir. 1978).

of the limitations provision is "to ensure expedition in the filing and handling of those complaints." Not surprisingly, the scheme enacted by Congress effectuates these two different goals by imposing two different requirements on those who seek to invoke the remedial provisions of Title VII. Thus, a charge *must not* be filed with the EEOC until after the expiration of the mandatory deferral period (or termination of state proceedings), yet a charge *must* be filed with the EEOC within 300 days of an alleged unlawful employment practice. As a practical matter, a person who complains to the EEOC within 180 days of an alleged illegal employment practice can be sure of neither tripping on the deferral threshold nor bumping against the limitations ceiling. Regardless of whether the relevant state has created an agency to which deferral is necessary, and regardless of how long any such agency has been in existence, and regardless of how quickly any such deferral agency terminates its proceedings, the complaint will be timely.

The majority's refusal to read the statute as written interferes significantly with the congressional decision to require prompt action on the part of Title VII plaintiffs. The legislative history of the predecessor of § 706(e) makes clear that the section contains two different limitations periods not to reward persons in deferral states, but rather to ensure that they are not penalized for having to comply with the statute's deferral requirements.

As originally enacted in 1964, Title VII required extraordinary diligence on the part of complainants. The original limitations provision (then labelled section 706(d)), like present section 706(e), contained two different limitations periods. The statute provided for a basic 90 day filing period and a 210 day period --the latter to apply to cases where state procedures were followed. Looking at the legislative history of this original limitations section, in *Moore v. Sunbeam Corp.*, 459 F.2d 811 (7th Cir. 1972), Justice (then Judge) Stevens concluded:

> The legislative history as a whole indicates a basic purpose to require the complainant to make his initial filing within 90 days; the extension of the period to 210 days in certain states was plainly intended to permit him to "exhaust" the state procedures. There is no suggestion that complainants in some states were to be allowed to proceed with less

> diligence than those in other states. [Selections from the legislative history] indicate that unless a complainant pursues his state remedies with sufficient diligence to permit the state, within 210 days, either to complete its action or to have 60 days in which to act without federal interference, he may not file a timely charge with the EEOC.

459 F.2d at 825 n.35. Before passage of the 1964 legislation, Senator Dirksen clearly explained the relationship of the proposed deferral section and the proposed limitations section:

> "New subsection (d) [now labelled (e)] requires that a charge must be filed with the Commission within 90 days after the alleged unlawful employment practice occurred, except that if the person aggrieved follows State or local procedures in subsection (b) [now labelled (c)], he may file the charge within 210 days after the alleged practice occurred or within 30 days after receiving notice that the State or local proceedings have been terminated, whichever is earlier. *The additional 120 days is to allow him to pursue his remedy by State or local proceedings."*

Id. quoting the EEOC's Legislative History of Titles VII and XI of Civil Rights Act of 1964 at 3018 (emphasis added). The equally unambiguous remarks of Senator Humphrey make clear that the 210 day limitations period for deferral cases was intended to protect a complainant against losing the right to file with the EEOC "simply because the 90-day period for filing with the Federal Commission has elapsed while he seeks to pursue State remedies." *Id., quoting* Legislative History, *supra,* at 3006.

When Title VII was amended in 1972, both limitations periods were lengthened. New section 706(e) specifies a base period of 180 days and a period of 300 days applicable to complainants subject to the statute's deferral requirements. The differential between the two remained the same: an aggrieved individual in a deferral state still has an extra 120 days in which to file with the EEOC so that compliance with the deferral requirements of the act can be achieved. Thus the limitations section as amended still ensures that no penalty is exacted from those in deferral states. No more diligence is required of those complainants

than is required of their counterparts in states lacking deferral agencies.

Like the cases on which it relies, the majority opinion overlooks the legislative history which clearly establishes that the statute is to be applied as it reads. *See Richard v. McDonnell Douglas Corp.,* 469 F.2d 1249 (8th Cir. 1972); *Anderson v. Methodist Evangelical Hospital, Inc.,* 464 F.2d 723 (6th Cir. 1972); and *Vigil v. American Telephone and Telegraph Co.,* 455 F.2d 1222 (10th Cir. 1972). The majority offers nothing to support the assumption, necessarily implicit in today's decision, that Congress intended to give complainants in deferral states a 120 day bonus and to excuse them from exercising roughly the same degree of diligence required of persons in non-deferral states. It should be noted that in 1975, the Eighth Circuit, sitting en banc, concluded that an examination of the legislative history excerpted above necessitated a rethinking of *Richard v. McDonnell Douglas Corp., supra,* which had attempted to interpret Title VII's filing requirements without reference to this history.

> [I]t would not be in keeping with the intent of Congress to allow one individual 300 days to file a charge because of the fortuitous circumstance that the state where the claim arose is a deferral state, when another individual in a non-deferral state will have only 180 days in which to file.
>
> The purpose underlying the extended period in a deferral state is to give the state agency an initial opportunity to process the claim without jeopardizing the federal right, not to extend by 120 days the time for assertion of this federal right.
>
> . . . .
>
> While we agree that "the statute leaves much to be desired in clarity and precision," . . . there is no doubt as to what the extended filing period in [§ 706(e)] was intended to accomplish. In the 1964 Act a complainant was given 90 days in which to file a charge of employment discrimination. However, due to the proviso in then [§ 706(b)] that the charge must first be made with a state or local agency if one exists, an additional 120 days was given to file a charge with the

EEOC to allow a complainant to pursue his state or local remedies without prejudicing his federal right.

The extended filing period was not intended as a bonus for complainants residing in a deferral state but as a means of effecting an accommodation between the federal right and the requirement of pre-amendment [§ 706(b)] of initial resort to an available state or local agency.

We are here concerned with amended Title VII. However, except for an enlargement of time for filing a charge from 90 to 180 days and concomitant extension of the deferral provision to 300 days, there were no substantive changes made in [§ 706(d)] (renumbered [§ 706(e)]).

Olson v. Rembrandt Printing Co., 511 F.2d 1228, 1231-33 (8th Cir. 1975) (footnote and citation omitted).

The only legislative history on which the majority relies is an excerpt from a report of the House-Senate Conference Committee on the 1972 amendments, which endorsed the decision of the Tenth Circuit in *Vigil.* However, the fact remains that in 1972 Congress chose to leave the design and wording of the limitations subsection intact; the only changes made were a renumbering of the section and the lengthening of the two limitations periods contained therein. In my view, since the intent of the enacting Congress is unambiguous and the amending Congress chose to retain the original scheme, the evidence is insufficient to permit the inference that the later Congress intended to accomplish wholly new ends by leaving intact the scheme constructed by an earlier Congress which had different purposes in mind. *See Oscar Mayer & Co. v. Evans,* 47 U.S.L.W. 4569, 4571-72 (U.S. May 21, 1979).

Finding little support in the language of the statute or in its legislative history, today's decision apparently rests on the widely accepted and reasonable principle that as a remedial statute often invoked by laypersons, Title VII should be interpreted flexibly so as to eliminate procedural barriers that serve no purpose. However this principle cannot be taken to authorize the judicial remodelling of all provisions of a remedial statute that place strict limitations on the access road to the newly-created remedy. For

example, in *Love v. Pullman Co., supra,* the Supreme Court made three crucial observations in approving the EEOC practice of (1) making referrals to state agencies on behalf of complainants in deferral states and (2) delaying formal filing of a charge until expiration of the deferral period or termination of state proceedings. First, the Court noted that the EEOC practice interfered with neither the policy of deferral to state procedures nor the goal of expedition in the handling of claims. Second, the Court noted that no legitimate interest of defendants was prejudiced. Finally, the Court noted that nothing in Title VII suggests that state proceedings may not be initiated by the EEOC acting on behalf of a complainant or that the EEOC may not delay the formal filing of a complaint until termination of state proceedings. It was these determinations that led the Court to conclude that requiring a second filing by a complainant "would serve no purpose other than the creation of an additional procedural technicality." 404 U.S. at 526 (footnote omitted).

The EEOC practice in the instant case does not meet these tests. First, permitting a charge to be filed with the EEOC at any time within 300 days regardless of whether the extra time has been used as intended, is to sacrifice the diligence Congress sought to require of Title VII complainants. Although the majority assures us that the interpretation adopted today "does not countenance the filing of stale claims," I respectfully suggest that when Congress bestows new rights and remedies on some persons and imposes new obligations and liabilities on others, its judgment regarding how and when claims are to be asserted and preserved ought not to be lightly disregarded. "Even though a statute of limitations may 'permit a rogue to escape,' the legislative commands must be respected." *Moore v. Sunbeam Corp., supra,* 459 F.2d at 826 n.37, *citing Toussie v. United States,* 397 U.S. 112, 123-24 (1970). Second, to the extent that the repose granted by Congress to potential defendants has been delayed, they have been adversely affected by the EEOC practice. Finally, the language of the statute indicates that the result reached today was simply not intended by the authors of Title VII. Deference to agency interpretation is appropriate only when consistent with deference to the intent of Congress.

Referring to the many "procedural requirements and time limitations that must be met before a claim of dis-

crimination can be brought to the attention of a federal court," and *citing Love v. Pullman, supra,* we have remarked:

> The procedures thus mandated exist not for their own sake, but rather in furtherance of substantive purposes . . . .[T]he rigid insistence on meticulous observance of technicalities *unrelated to any substantive purpose* is inappropriate.

Weise v. Syracuse University, 522 F.2d 397, 411, 412 (2d Cir. 1975) (citations omitted).[3] It must be remembered, however, that where, as here, a procedural requirement *does* further a substantive purpose, it is judicial disregard of the statutory design that is inappropriate.

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3 It is interesting to note that the *Weise* Court apparently assumed, in dictum, that the deferral process was to be *completed* within 300 days:

> If the alleged unlawful employment practice occurs within a state or locality having a law prohibiting such a practice, an aggrieved person cannot file a charge with the EEOC until 60 days have elapsed after the commencement of such state or local proceedings . . . . Resort to the EEOC *thereafter* is conditioned on the filing of charges not more than 300 days after the occurrence of the alleged unlawful practice or 30 days after the termination of state or local proceedings, whichever is earlier.

Weise v. Syracuse University, 522 F.2d 397, 411 (2d Cir. 1975) (footnote and citation omitted) (emphasis added).

NEW YORK STATE: EXECUTIVE DEPARTMENT
DIVISION OF HUMAN RIGHTS

COMPLAINANT

RALPH H. SILVER

VS. Case Nos.
IV-E-C-1581-76E

MOHASCO CORPORATION E-C-43805-76E

RESPONDENTS

DETERMINATION AND ORDER AFTER INVESTIGATION

On August 12, 1976, Ralph H. Silver, who is of the Jewish faith, filed a verified complaint with the State Division of Human Rights charging the above-named respondent(s) with an unlawful discriminatory practice relating to employment, because of his creed, in violation of the Human Rights Law of the State of New York.

After investigation and following a review of related information and evidence with named parties, the Division of Human Rights has determined in the above-entitled complaint that there is no probable cause to believe that the respondent(s) engaged in or was (were) engaging in the unlawful discriminatory practice complained of.

This determination is based on the following: Complainant herein alleges that he was terminated from employment because of his creed. Respondent has officers and upper/middle management personnel of complainant's stated religious faith. It cannot be ascertained that complainant's employment was terminated for reasons other than management's judgment that his job performance was unsatisfactory.

This complaint is therefore ordered dismissed, and the file is closed.

THE COMPLAINANT OR ANY PARTY TO THE PROCEEDING BEFORE THE DIVISION MAY APPEAL THIS ORDER TO THE STATE HUMAN RIGHTS APPEAL BOARD, TWO WORLD TRADE CENTER, 82ND FLOOR, NEW YORK, NEW YORK 10047, BY FILING A NOTICE OF APPEAL WITHIN FIFTEEN (15) DAYS AFTER THE DATE OF THE SERVICE OF THIS ORDER.

DATED: Feb. 9, 1977
STATE DIVISION OF HUMAN RIGHTS

By /s/ John W. Walker, Jr.
John W. Walker, Jr.
Regional Director

TO: Ralph H. Silver, Complainant
211 Cresent Village
Clifton Park, New York 12065

Mohasco Corporation
Respondent
Richard H. Lange, Esq.
Attorney for Respondent
57 Lyon Street
Amsterdam, New York 12010

STATE OF NEW YORK: EXECUTIVE DEPARTMENT
STATE HUMAN RIGHTS APPEAL BOARD

ORDER

RALPH H. SILVER,
COMPLAINANT-
APPELLANT

Case No. E-C-43805-76E

APPEAL NO. 4035

VS.

MOHASCO CORPORATION,

RESPONDENT

The above-entitled appeal having been filed with this Board on February 19, 1977 by Ralph H. Silver, complainant-appellant and the record having been requested on February 28, 1977 and submitted by the State Division of Human Rights on March 22, 1977 and the appeal having come on to be heard before Honorable Irma Vidal Santaella on the 16th day of November, 1977 and Ralph H. Silver, complainant-appellant having appeared in person and argued on his own behalf and respondent having appeared by Robert H. Lange, Esq., General Counsel, who submitted a Statement and Memorandum of Law, and by Bouck, Holloway & Kiernan, Esqs., Warner M. Bouck, Esq., who argued on behalf of respondent, and the State Division of Human Rights having appeared by Gladys M. Foster, Esq., Senior Attorney, who submitted on the record, and

The Board having reviewed the record herein and having considered the arguments of the parties, and Statement and Memorandum of Law on behalf of the respondent, and a majority of the Board having decided that the Determination and Order of the State Division of Human Rights dismissing the complaint of the complainant-appellant was not arbitrary, capricious or an abuse of discretion (Hon. T. Blum not participating), it is

ORDERED that the Determination and Order of the State Division of Human Rights made herein on February 9, 1977 be, and the same is hereby in all respects affirmed.

STATE HUMAN RIGHTS APPEAL BOARD

By /s/ Irma Vidal Santaella
Irma Vidal Santaella, Chairman

Dated & Mailed: December 22, 1977

TO:

APPELLANT

Ralph H. Silver
211 Crescent Village
Clifton Park, N.Y. 12065

RESPONDENT

Mohasco Corporation
Richard H. Lange, Esq.
Attorney for Respondent
57 Lyon Street
Amsterdam, N.Y. 12010

Bouck, Holloway & Kiernan, Esqs.
107 Columbia Street
Albany, NY 12210
Attn: Warner M. Bouck, Esq.

DOHR

Commissioner Warner Kramarsky
State Division of Human Rights
2 World Trade Center
New York, N.Y. 10047

Ann T. Anderson, Esq., General Counsel
State Division of Human Rights
2 World Trade Center
New York, N.Y. 10047

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
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(716) 842-5170

Charge No. 023760777
(TBU6-0777)

Ralph H. Silver
211 Crescent Village
Clifton Park, New York 12065

Charging Party

Mohasco Corporation
37 Lyon Street
Amsterdam, New York 12010

Respondent

DETERMINATION

Under the authority vested in me by Section 29 CFR 1601.19 (b)(d) of the Commission's Procedural Regulations (September 27, 1972), I issue, on behalf of the Commission, the following determination as to the merits of the subject charge.

Respondent is an employer within the meaning of Title VII and the timeliness, deferral and all other jurisdictional requirements have been met. Substantial weight has been accorded the findings of the New York State Division of Human Rights, which are attached. Having examined the New York State Division of Human Rights' findings and the record presented, I conclude that there is not reasonable cause to believe the charge is true.

This determination concludes the Commission's processing of the subject charge. Should the Charging Party wish to pursue this matter further, he may do so by filing a private action in Federal District Court within ninety (90) days of his receipt of this letter and by taking the other procedural steps set out in the enclosed NOTICE OF RIGHT TO SUE.

ON BEHALF OF THE COMMISSION:

8/24/77 /s/ Edwin C. Casler
DATE EDWIN C. CASLER, DISTRICT DIRECTOR

Enclosures: (2)
706 Agency Findings
Notice of Right to Sue

APPENDIX B

Statutes Involved

Section 706(c) of Title VII of the Civil Rights Act of 1964 as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-5(c), reads as follows:

> (c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

Section 706(e) of Title VII of the Civil Rights Act of 1964 as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-5(e), reads as follows:

> (e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice

with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.